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Double-discussion Procedure

REPORT A

International Labour Conference

TWENTY-SIXTH SESSION
GENEVA, 1940

RIGHTS OF PERFORMERS

in Broadcasting, Television

and the

Mechanical Reproduction of Sounds

Fourth Item on the Agenda

INTERNATIONAL LABOUR OFFICE
GENEVA, 1939

CONTENTS

INTRODUCTION

The expression " performers' rights " is used to denote a certain number of rights, particularly in respect of remuneration, which it has been proposed should be recognised as belonging to the artists who interpret works of art (musicians, actors, etc.) owing to the profound change that the new techniques of phonographic recording and broadcasting have brought about in the conditions under which they perform.

The decision taken by the Governing Body of the International Labour Office at its Eighty-sixth Session (February 1939) to place the question of the rights of performers as regards broadcasting, television and the mechanical reproduction of sounds on the agenda of the International Labour Conference was the outcome of a series of negotiations and enquiries effected by the Office over a period of several years with the assistance of experts and the support of various international institutions concerned with the subject of intellectual rights. The special character of the whole problem makes it necessary to go into this preparatory work in some detail and to give a brief account of the legal and practical considerations which influenced its progress.

When the question was first taken up by the International Labour Office it was given the title : " Rights of Performers in Broadcasting and the Mechanical Reproduction of Sounds and Images ", which would have meant that the field of study and the measures proposed could cover also questions relating to the cinema. But these are quite distinct, both from the legal point of view (even the question of the authorship of a film is still the subject of much discussion) and from that of the very special conditions obtaining in the cinema industry. It was therefore felt that they ought to be reserved for separate treatment and that it would be better not to handle them together with the problems of the phonographic and wireless reproduction of artistic performances. Hence the new title, which by using the word " television " limits the forms of visual reproduction covered by the decision of the Governing Body.

It should also be pointed out that as far as the position of the performer and his conditions of employment are concerned, there is no important theoretical or practical difference between the problem of television and that of the wireless broadcasting of sounds. The technical aspects of the two processes differ, it is true; but the problems facing the performer are the same. Whether the performance is visual or auditive, the question to be answered concerns the conditions under which, though remunerated as a direct performance to a limited audience, it can be transmitted to a wider public by means of a microphone (or television apparatus — a device which is likely to become increasingly common) situated in the place of entertainment. Another question which applies to both forms of transmission concerns the conditions in which the phonographic recording of an auditive performance, or a visual performance recorded by the existing experimental methods (or by processes not yet in use), can be broadcast or televised. The problems raised are thus common to both fields; and since no differences have been found between them in connection with any of the points examined in this Report, it has been considered unnecessary to mention television whenever a question relating to broadcasting is discussed.

The Governing Body, in deciding at its Eighty-sixth Session (February 1939) to place the question on the agenda of the 1940 Session of the Conference, agreed that it should be treated by the double-discussion procedure provided for by the revised Standing Orders adopted by the Conference at its 1938 Session.

This report has been prepared in accordance with these revised Standing Orders. It contains a summary of the reasons which led the International Labour Organisation to take up the question of performers' rights (changes in performers' conditions of life, and demands put forward by performers), and of international action on this question; a description of the regulations in the countries in which the question is the subject of special measures or schemes; an account of the meeting of the Committee of Experts set up by the Governing Body; and a questionnaire, with commentary, relating to the various points which have arisen out of the enquiries of the International Labour Office and the discussions and conclusions of its Committee of Experts.

On the basis of the replies of Governments to this questionnaire, the Office will prepare a second report, indicating the principal questions requiring consideration by the Conference in 1940.

If the Conference, after a first discussion for which the present report and the second report will provide the basis, decides that the subject shall be placed on the agenda of the next session of the Conference for second discussion, the Office will prepare a third report which may contain one or more proposed Draft Conventions or Recommendations and transmit it to Governments in order that they may make comments on, or suggest amendments to, the proposed texts.

Lastly, the Office will prepare, in the light of the observations made by Governments, a fourth report containing the texts of proposed Draft Conventions or Recommendations which will be submitted for final decision by the Conference at its session of 1941.

In accordance with this revised procedure, Governments are now requested to reply, giving their reasons, to the questions in the questionnaire appearing at the end of this Report.

CHAPTER I

HISTORICAL SURVEY

§ 1. — Transformation of Performers' Conditions of Life

The appearance of phonographic recording and of wireless telegraphy towards the beginning of the twentieth century and their extraordinary development in subsequent years have revolutionised the position of interpretative artists. These inventions affected the interpretation of works of art in two important ways, which were destined in turn seriously to influence the economic situation of the performer. One of these effects, due to the invention of the phonograph, was that the performance — hitherto short-lived and unsubstantial — took on a lasting and tangible form ; it became an object capable of preservation and of permanent and repeated use. The other effect, due to broadcasting, consisted in a considerable extension of the audience ; the performance could be heard, no longer in a concert hall or theatre only, but by a circle of listeners which steadily widened until its only limits were those of the earth.

This was a transformation of the first importance, relating to two media, time and space. While one of these phenomena, the increase *ad infinitum* of the audience, was only the extension of an existing factor, the other conferred on the interpretation of works of art an aspect hitherto unknown : it could be rendered substantial and permanent. These two factors were soon to have very serious consequences for the professional activity and the conditions of life of artistic performers — consequences all the more serious because the two new techniques were grafted one on to the other and each lent the other strength, since wireless transmission enables sounds to be recorded at a distance and the gramophone record is admirably suited for use in broadcasting.

The performers, whether actors or musicians, were soon faced by unemployment rising to catastrophic proportions. The public, able to listen to music and the drama at home, deserted the theatres and concert rooms. Dance halls, cafés

and similar establishments more and more frequently used recorded or broadcast music and were thus able to dispense with the services of the orchestras which they had previously employed. Even the crowded cinemas, which had provided a certain number of openings for musicians in the days of the silent film, ceased to employ them after the sound film had been invented. The result was an almost desperate situation, which has been for many years the subject of complaint by occupational organisations, but is difficult to express in figures, because there are few statistics in this field. The following data will however bear witness to the gravity of the situation; and the wide distribution of the countries to which they apply shows the universal character of the evil. In France, where there were about 7,000 theatrical artists in 1932, it was estimated that only 1,500 had employment. In the United States, in 1935, the list drawn up by the Administration of cases in which relief was urgently needed (a list far from registering all unemployment) contained the names of 15,000 unemployed musicians. An enquiry into unemployment among professional workers in Japan showed that the proportion of musicians unemployed in 1936 was 41 per cent., as against 16 per cent. for technical employees in industry. Lastly, in 1937 a statistical enquiry into the musical profession in Vienna showed that 90 per cent. of the members of this profession were without employment.

No doubt broadcasting and recorded music are not the only causes of this situation. The general depression, which has affected all occupations, manual and non-manual, provides a partial explanation. It should, however, be pointed out that whereas in most branches of production the depression has been characterised by obvious under-consumption, never in history has the public listened to so much music and so many entertainments as to-day, when interpretative artists are so grievously affected by unemployment.

A paradoxical situation had thus arisen, in which a very rapid increase in artistic entertainment was accompanied by an unprecedented decline in the employment of performers. Even if allowance is made for the effects of the general economic depression, the appearance and development of broadcasting and musical recording may be held chiefly responsible for the position in which interpretative artists found themselves — and still find themselves to-day. Unless adequate measures

are taken, moreover, the difficulties are likely to persist, for even the passing of the depression and the return of full economic prosperity will affect them but little. In fact, unemployment among performers may be said to offer a typical example of economic dislocation which, being due to technical developments, is of a lasting character. Cases of such dislocation call not only for temporary palliation or social welfare measures, but also for the reorganisation of the trade concerned.

The new technical developments, of course, entail certain advantages for performers as well as disadvantages. There are several celebrated artists who are known to owe their success chiefly to recording and broadcasting. It was through these media that the public came to know and appreciate them. Without the opportunities offered to them by the gramophone and the wireless they would probably never have made a name; they would never have become, as they have, objects of that popularity which opens the way to really remunerative engagements. These new transmitting agents, by reason of their vast range of action, prepare for the performer those long and profitable tours in which he finds welcoming audiences everywhere, even in the most distant places.

But it must be remembered that only a small number of "stars" have obtained such benefit from the technical innovations in question and owe them a large part, or at least some part, of their success. Moreover, as was pointed out by one of the performers consulted by the International Labour Office as an expert, the sudden popularity which modern methods help the artist to acquire may lose in duration what it gains in intensity. Perhaps the reputation of a "star" wanes more quickly to-day than in previous times, the satiety point in public interest being reached sooner. However this may be, it can be affirmed that although valuable services have been rendered by the wireless and the gramophone to certain artists, these constitute but a very small minority of their profession.

Much more important are the opportunities offered by the two innovations to a limited number of performers in connection with regular broadcasting programmes and recording. Many musicians have certainly found regular employment in broadcasting stations, some of them being members of the permanent staff of these stations, while others are called upon to broadcast frequently enough to enable them to derive a substantial part

of their income from this source. The number of artists who are able to benefit by these opportunities, however, is not such as to justify the view that openings in recording and ordinary broadcasting compensate even approximately for the competition with direct public performances that results from the new technical devices.

Moreover, an important additional factor has altered the balance of the two new industries, recording and broadcasting, and has still further aggravated, if that were possible, the position of the performers. The extraordinary growth of the gramophone industry no doubt gravely affected the demand for direct musical and dramatic performances; but the harm done was to some extent reduced by the fact that the industry had to produce a ceaseless flow of new records in order to meet the growing public demand, and by its ability to devote considerable sums to the payment of the artists employed for recording. But in recent years the sale of gramophone records has decreased considerably, owing apparently to the growth of broadcasting and to the more and more frequent use which that industry makes of recorded music. Manufacturers of records at least regard this as the principal cause of the falling-off in their sales. Thus the receipts of manufacturers from records sold in the United States fell from over $47,000,000 in 1921 to $3,628,016 in 1935[1]. On the other hand, the number of listeners rose from 16 million in 1925 to 60 million in 1932; and in four years, between 1925 and 1919, the total receipts from the sale of wireless sets rose from $165,000,000 to $592,000,000. Moreover, a report submitted to the International Congress of the Phonographic Industry in 1933 called attention to a considerable fall in the sales of records in many countries and attributed this to broadcasting in general and more particularly to the use which broadcasting makes of records (up to 100 per cent. of the programmes of certain small stations)[2].

The harm which this method has done to performers is twofold. Firstly, the openings previously provided by the gramophone industry are very greatly reduced owing to the

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[1] Rudolf LITTAUER : " The Present Legal Status of Artists, Recorders and Broadcasters in America ", *Geistiges Eigentum*, 1938, p. 218.

[2] Proceedings of the First International Congress of the Phonographic Industry, 1933. Rome, 1934.

critical position in which this industry is placed ; and secondly, the frequent use of gramophone records for broadcasting replaces the living artist in the studio and thus deprives him of another possibility of employment.

It must be admitted that broadcasting authorities or undertakings could not function and could not offer the public the programmes they now provide if they had to do without gramophone records. The money saved by the use of the gramophone is considerable and the funds at the disposal of the broadcasting establishments are far from enabling them to employ the artist himself on a regular and continuous basis. An instance quoted at the First International Congress of the Phonographic Industry is a good illustration of this : in the United States, a chain of broadcasting stations had to pay $5,000 to a famous orchestra for transmission of a concert ; a rival group bought several records made by the same orchestra and was able to broadcast a concert of equal length and similar artistic value at a cost of less than $10. An enquiry conducted in 14 European countries showed that in three months the time on the air given to the broadcasting of records was over 8,000 hours ; the price of the records thus broadcast was estimated at £9,230 in all ; but if the broadcasting companies had had the same programmes given by the artists themselves, they would have had to pay over £200,000. These calculations were based on the assumption that each record was broadcast once only, whereas in fact a record may be broadcast several times — a practice which greatly increases the saving made.

It should be emphasised once more that only by recourse to gramophone records can the broadcasting establishments function as they now do and offer the public high-grade and varied programmes ; to deprive them of this possibility would be a serious blow to their financial equilibrium and their artistic possibilities. But it is none the less true that performers suffer severely from this situation. They are the hardest hit of all the parties collaborating in wireless telegraphy, since the others have succeeded, at least in some countries, in securing the payment of a certain compensation in case of broadcasts of this sort.

§ 2. — Claims of Performers

The steps taken by performers to remedy the precarious situation in which they found themselves were of several

kinds. Their organisations demanded that measures should be adopted to create new openings in employment, regulate the entry of new members into the profession, and so on. Among the proposals for the improvement of their economic position and for the establishment of a status for performers interpreting works of art which would take account of the changes caused in their conditions of work by technical innovations, was a suggestion that certain rights should be granted to them in respect of broadcasting and the mechanical reproduction of sounds.

The claims made by performers at their national and international meetings and in the memoranda which they have submitted to the competent national authorities and international institutions relate to a number of subjects, varying with the circumstances. Some of the desires expressed cover in brief and general terms the whole field of possible new rights, whereas others go into detail and bring out even the subsidiary features of the necessary action. The following essential points may be extracted from the mass of resolutions, memoranda and replies to investigations; they constitute a fairly complete picture of the various claims made during the last fifteen years.

These may be classified under three heads, corresponding to the customary notions of the right of authorisation, non-material rights[1] and pecuniary rights.

Right of Authorisation

Performers have claimed, first of all, a right which certain legal experts classify as belonging to the non-material group, whereas others prefer to consider it as a general principle, above and including both material and non-material rights, and indeed as the source from which all others flow. For a performer this is the exclusive *right to authorise* the reproduction, transmission or recording by mechanical, radio-electric or other means of his interpretation or performance, as well as the public performance of the interpretation thus transmitted or recorded.

The right of authorisation, which the performer has

[1] Also sometimes called "moral rights". It will be seen below that, although in contrast with pecuniary rights they may be conveniently called "non-material", they are not without material (i.e. economic) significance.

sometimes claimed in a narrower field (excluding, for instance, the authorisation of public performance) was stated in its most extensive form by the International Union of Artistes in the draft for an international Convention prepared by that body (see Appendix V). Recognition of this right would enable the artist to prevent all broadcasting of his interpretation to which he had not expressly consented in his contract of employment or which he had not authorised in some other manner, and to take proceedings against those responsible for any unauthorised recording or for any unauthorised broadcasting or public use of a record, even of one made with his authorisation.

The third International Stage Congress (lyric section), held at Barcelona in 1929, demanded that performers should be granted the exclusive right to authorise the communication of their performance to the public by means of broadcasting, the adaptation of their performances to instruments for reproduction by mechanical means and the public execution of their performances by means of such instruments.

In a memorandum submitted to the International Labour Office in 1931 the French Confederation of Professional Workers claimed these rights for performers, and added of that of authorising the sale or hire of records of their interpretations. The International Confederation of Professional Workers had declared, in a resolution relating to broadcasting adopted at its Congress at the Hague in 1929, that no broadcast, either of a direct execution or of a record, should be permitted without the authorisation of both author and performer of the work.

The first International Legal Congress on Wireless Telegraphy and Telephony approved this claim on the part of performers by resolving that " the radio-electric transmission of the execution of an intellectual, literary or artistic work should not be permitted without the consent of the performer " ; and it will be seen below that the organisers of the Revision Conference of 1928 attempted to insert this principle in the Berne Convention on authors' rights.

The exclusive right of performers to authorise the reproduction, recording and broadcasting of their interpretations has — more than any other of the performer's claims — always been fought by authors, who regard it as an intolerable invasion of their own exclusive right. Legal experts of high reputation, such as Mr. Piola-Caselli, have done their utmost to prove that

the co-existence of two such rights is inconceivable. Performers, on the other hand, state that if their right in this connection were recognised, it would of course apply to their own interpretations only and that the author's exclusive right, which applies to the work itself, would not be affected.

Non-material Rights

By the phrase " non-material rights " is meant the performer's rights to respect for the personal contribution that he makes to a work of art when interpreting it. His performances bear the mark of his personality and cannot be changed without entailing a kind of misrepresentation of that personality. Nor can they be attributed to other persons. But although non-material rights aim only at protecting non-material goods, namely the artist's identity and the integrity of his performances, they have economic effects, for much of the artist's reputation depends on them and hence the negotiable value of his interpretations. For this reason performers have attempted to obtain not only a definition of the principles regulating the pecuniary conditions attaching to the use of their interpretations, but also the recognition of their non-material rights, which, though on a quite different plane, nevertheless affect their economic position.

The first non-material right claimed by performers is the right of *identification*, i.e. the right of the performer to have his authorship of every performance made known, to have his name placed on the records of his interpretations and stated whenever the interpretations are broadcast, either directly or by means of records. Performers attach great importance to this question, which may have a pronounced effect on the economic value of their labour. The draft for a Convention prepared by the International Union of Artists provides that " apart from pecuniary rights, and even after cession of these, the artist retains the right to attach his name to his interpretation ".

Still in the field of non-material rights, performers have demanded recognition of what is called the right to *respect for the performance*, i.e. the right to oppose its alteration or distortion. They consider that their reputation, and consequently the economic value of their work, are to a great extent dependent on this factor; and they therefore demand that they

should be granted a right of supervision over the technical quality of all reproduction, recording and broadcasting of their interpretations. The draft for a Convention prepared by the International Union of Artistes provided that the performer should have " the right to oppose any distortion, mutilation or modification of his interpretation, which would be prejudicial to his honour or reputation ". The French concert managers' organisation *(Chambre syndicale des organisateurs de concerts de France)* informed the International Labour Office in 1933 that it approved the claims of performers with regard to guarantees against bad transmission. It is obvious that the artist might be regarded as responsible for unsatisfactory timbre, poor audibility or other faults which were in fact due to defective technical conditions, and that his reputation might suffer. It is not therefore surprising that numerous artists' organisations informed the International Labour Office, during the investigation it made in 1933, how valuable it would be for them to be able to supervise the technique of recording and broadcasting; and some desired even to take such supervision to the point of requiring that the indicated speed for playing records should be observed in public and that records of their performances when broadcast should not be surrounded in the programmes by other items which might render them ridiculous.

Pecuniary Rights

Apart from non-material rights, performers demand recognition of their right to pecuniary advantages in various forms. This right would apply to broadcasting on the one hand and to recording on the other.

In the field of broadcasting, the performer's right to special remuneration, it is argued, should be recognised in the case of every interpretation which is broadcast, unless it has been expressly performed for broadcasting purposes and paid for as such. In other words, the performer should be entitled to supplementary remuneration on every occasion on which his interpretation, having been paid for by an employer in respect of performance in specified premises or in specified circumstances and no provision having been made for broadcasting, is nevertheless broadcast. The arguments on which performers base their claim for this additional remuneration — which is one of the essential features of their programme — have been indicated above.

Apart from the special remuneration which they claim in respect of broadcasts not expressly provided for in the contract, performers have raised the question of public hearings of such broadcasts. If a loud-speaker is fitted to one of the many receiving sets which constitute the audience of the wireless station broadcasting the performance, and a more or less numerous audience is encouraged to listen, can this public hearing be considered as a reproduction of the original performance and should special remuneration be due to the artist in respect of it ? This is a highly controversial question, which authors, as being the persons primarily concerned, have been attempting for years to solve. The legal aspect of the problem has never been unanimously settled. In some countries the courts treat these hearings as separate performances and therefore as calling for fresh payment of all the fees prescribed for the original performance, whereas others regard them as simply extensions of the broadcast itself and hold that the fees paid for the latter cover it in its entirety, whatever the use to which it is put by the various receiving sets. Any final settlement of this legal question is likely to have an effect on performers' as well as on authors' rights[1].

In the matter of recorded sound, performers have claimed a certain percentage on the sale of each record of their performances. This is however simply a method of remuneration, which should be stipulated in the contract between the performer and the record manufacturer, and is not a right to be invoked against third parties. As under the royalty method stipulated in certain contracts between authors and publishers, performers would thus be paid for recording in proportion to the success which the records achieved.

The position is different with regard to public hearings by means of records. Performers consider that the remuneration they receive for the recording of their interpretation corresponds only to a private use of the resulting records ; as soon as the records are used for public hearings, either by broadcast or by gramophones in public places, the performer's loss is far from being compensated by the original payment. It should be pointed out at once that on this point all the parties

[1] Cf. in particular, *Le droit d'auteur*, 46th year, No. 5 (Belgian and German rulings) ; and *Inter-auteurs*, No. 48, p. 827 ; No. 49, p. 853 ; No. 61, p. 210.

concerned in the production of the recorded performance — the author, the performer and the record manufacturer — are of the same opinion. Indeed, the public playing of recorded music raises the questions of authors' rights, manufacturers' rights and performers' rights. As will be pointed out below, the first two parties have already obtained more or less extensive satisfaction, but the question of performers' rights remains open.

The pecuniary rights claimed by performers' and professional workers' organisations are embodied in numerous resolutions.

The International Confederation of Professional Workers resolved as follows at its Congress at The Hague in 1929: "The special material and non-material rights of performers, arising out of the new circumstances set up by new inventions, should be recognised. . . "

The International Union of Musicians declared in 1930 that the broadcasting of a concert or other performance or entertainment without fair compensation should be prohibited; " the societies for authors' rights, " the Union continued, " provide for the payment of fees for each public execution. The same right might be granted to performers. "

The draft for a Convention prepared by the International Union of Artistes provided that rights in respect of reproduction, recording and transmission, as well as of public performance, should be vested in the performers, but could be ceded to third parties. This draft thus takes the general right of authorisation as the source of performers' pecuniary rights.

The Union of Musicians of the Northern Countries (which includes the Musicians' Associations of Sweden, Denmark, Norway and Finland) voted at its Congress at Oslo in May 1934 in favour of establishing " the right of the performing musician to compensation when his performance is reproduced mechanically by wireless, the gramophone or the sound film " as a principle. This resolution was submitted to the International Labour Office with the additional signatures of artists' organisations in Austria, Belgium, Czecho-Slovakia, France, Great Britain, Latvia, Switzerland, the United States and Yugoslavia, representing about 217,000 performers in all.

Other Points

Apart from questions of primary importance relating to material and non-material rights, the performers' organisations in formulating their claims, have put forward numerous secondary points regarding various aspects of the rights in question, their application, the methods to be followed in drafting regulations, etc. The consultation undertaken by the International Labour Office's Sub-Committee on Performers' Rights in 1932 gave these organisations the opportunity to put forward several points of detail.

Thus the question arose of the definition of the *personal scope* of the new rights. There were two theories. Should certain of the rights, particularly that of supervision, be exercised by all performers, whatever their degree of skill and talent, or only by " stars " of established reputation ? The large majority of performers reject this second alternative (which many legal experts also condemn) and point out among other arguments how difficult and how dangerous it would be to embody in regulations a conception as arbitrary and subjective as that of personal talent or reputation.

If the new rights are to be recognised as applying to all performers, the question of choirs, orchestras and other groups of artists remains to be settled. It is realised in the circles concerned that it would be difficult to deal with each separate member of such a group and that between the parallel rights of each there might be contradictions which would paralyse the activity of the group as a whole ; there has therefore been unanimity in favour of delegating the powers of members of such groups to responsible representatives (the conductor, impresario, etc.), it being understood that soloists who take part in joint performances should be in a position to establish their claims individually.

Another point raised by the parties concerned is that of the *duration* of the rights to be recognised. Those who have studied this subject desire that, by analogy with the method adopted in respect of authors' rights, the rights of performers should be valid for the whole of the performer's life, and that after his death the heirs should benefit by them for a number of years to be determined. The question of the duration of rights naturally arises only with regard to records and does not apply to broadcasting. The case of records made in collaboration,

and particularly those of choirs, orchestras, etc. would clearly give rise to some difficulty and would have to be dealt with separately; there would be the same difficulty with regard to the collection of fees.

The question of the *cession* of rights has also been considered by performers. Some hold that it should be possible to cede rights for remuneration, while others maintain that certain non-material rights — and particularly that of authorisation — should be declared non-transferable.

Methods of enforcing certain rights, material or non-material (the *collection of fees* and the *supervision of reproductions*) have also been examined and various systems considered. One of the methods suggested is the establishment of societies for the collection and distribution of performers' fees, as is done in the case of authors' royalties. There is also the question of commuted fees, which might be paid, not to the artists themselves or their heirs, but to unemployment or pension funds for members of the professions in question. This system is regarded as particularly appropriate in the case of performances by choirs, orchestras, etc.

As regards technical supervision, it has been proposed to entrust it to performers' delegates attached to the broadcasting stations, or to government officials.

Performers have also on occasion demanded recognition of the right to *cancel contracts not fulfilled* within a certain period, so that they may resume their freedom of action with regard to the recording or broadcasting of their interpretations, and to *revoke ceded rights* if the assignee fails to take advantage of them. The object of this latter claim is to enable the performer to recover material or non-material rights which have been ceded to a record manufacturer for instance, but which the manufacturer has not thought fit to use.

Lastly performers have raised the question of *possible exceptions*; they recognise that rights might be suspended in case of certain performances of public value (for educational or charitable purposes, for instance). There is also the question of the settlement *of disputes*, for which the establishment of arbitration boards has been suggested.

As regards the *method* to be adopted with a view to regulating performers' rights, the performers themselves have considered the advisability of adopting a single set of general

principles applicable to two such clearly distinct fields as broadcasting and the recording of sound, or alternatively of separating the two problems so as to solve each in greater detail. On the whole their opinion has been in favour of the former method, or at least of a system which would permit the two groups of questions to be settled in some detail, and without confusing them, in a single set of regulations.

Lastly, the *form of the regulations* has been the subject of discussion and resolution by the performers' organisations. They have of course attempted to secure a certain degree of regulation by collective agreement and have called on the authorities for the adoption of legislative measures; but their resolutions are practically unanimous in desiring the preparation of international rules. They are convinced that, in this field, as in the field of authors' rights, the establishment of international standards would considerably clarify the situation and in many cases be a valuable prelude to the introduction of national measures. The universal character of the new techniques, which has already brought about various international agreements on other points than those now under examination, should, they believe, lead also to the international treatment of the problem of performers' rights. It will be seen below, in the account of the procedure before the international institutions, how urgently the performers' and professional workers' organisations have demanded preparation of regulations of this sort. In a memorandum which it submitted to the International Labour Office in August 1930, the International Confederation of Professional Workers gave the following grounds for its urgent request that the international action then undertaken should be pursued :

" The chief reasons why an international settlement is necessary are to be found in the actual nature of mechanical forms of reproduction, which are in fact international in character. Broadcasting is obviously international by its very nature, since it cannot be limited by national frontiers. Reproduction by means of gramophone records or other mechanical apparatus is no less international in character.

" It should, however, be remembered that the diffusion of artistic performances has always been regarded as one of the best means of interpenetration between one civilisation and another, and consequently the promotion of peace. It is difficult for artistic exchanges of this kind to take place if performers in different countries receive different treatment and enjoy different rights. The employers themselves would be faced with many difficulties owing to the existence of various divergent and possibly contradictory legislations. The material in question is unique in character and definitely international.

"It has long been recognised that international legislation is necessary to deal with industrial property and patents, and agreements have been reached on this subject. The same need has been found to exist as regards literary and artistic property. A diplomatic Convention on the subject was therefore adopted at Berne on 9 September 1886 . . . All States of an advanced civilisation which have a large intellectual production have adhered to this Convention. It will thus be seen that in the past an international convention has been found necessary whenever new rights have had to be established to protect work representing original production . . . It is therefore necessary to contemplate a special convention for performers whose rights are derived from their contract of service with their employers and from the innovations which have been introduced in the method of carrying out such contracts."

§ 3. — Action with a View to International Regulations

Such, in outline, were the claims put forward by performers in their occupational organisations and in the wider organisations of professional workers. This campaign, carried on by the persons directly concerned, coincided with another movement, begun by jurists specialising in questions affecting professional workers' rights, who had come to appreciate the importance of the legal problems created by recent inventions for the recording and diffusion of artistic performances. These jurists had noted the presence of a completely new element in the problem, which had to be analysed and placed in its proper relation to the older rights, such as copyright, and in respect of which a legal doctrine had to be formulated.

While the performers, supported by the general professional workers' organisations, were taking action in the national field, the question arose of finding means of effecting an international solution of the problem. International measures seemed more necessary here than in any other branch of activity. The universal character of wireless broadcasting, and the largely international market for the phonographic industry, naturally gave rise from the outset to the idea of an international solution. But how was such a solution to be reached ? What procedure should be adopted ? What institutions were qualified to examine the problem in its international bearings and take such practical steps as would be found necessary ? The replies given to these questions varied according to the different theoretical and practical standpoints from which they were viewed. It was seen that the character of the scheme of international regulation to be adopted would depend upon the legal

definition of the new rights and the nature of the proposed measures of enforcement.

Nature of Performers' Rights

Though numerous arguments based on economic conditions or on pure legal theory have secured wide recognition in recent years of the necessity for according certain rights to performers, the character of these rights has been the subject of some controversy. Are the rights to be accorded of an independent character, similar in nature to authors' rights and investing in the holder all the privileges which are included in the rights of an author ? Or are they to be regarded as of a derivative character, comparable to the rights of a person who translates or adapts a work of art ? Should they be considered simply as a matter of labour law and their foundation sought in the worker's freedom to dispose of the product of his toil ? Are performers' rights to be of an essentially economic character, involving financial privileges only, or should they include certain non-material rights vested in the artist's person ? Each of these questions has been amply discussed and legal debate has provided arguments first for one and then for another of the various occupational interests at stake.

It should be pointed out, first of all, that in a generaf way, and apart from the economic considerations in view ol which a remedy for the serious position of performers might be sought in a recognition of certain rights, the jurists agree that the inventions of broadcasting and the gramophone have introduced a new element deserving of study by specialists and justifying the elaboration of a new doctrine. In a report to the third International Legal Congress on Wireless Telegraphy and Telephony in 1928, Mr. Piola-Caselli, defining the recent transformation and analysing the work of performers, expressed this view in terms which have become classic : " The modern inventions of the gramophone, the cinema and broadcasting have given this work, or rather its product, the legal character of a *res*, i.e. of property with economic value which has an independent external existence and can therefore be apprehended, possessed and enjoyed by third parties — persons not bound by contractual relations with the creator of the *res* — even against the latter's wish."

As was pointed out by the International Institute for the Unification of Private Law, in a valuable report dated September

1935, the substantial character which performances now receive owing to the new technique involves a problem similar to that raised by the invention of printing. Just as the recognition of authors' rights is the result, obtained after a long evolutionary process, of the need to protect writers against the utilisation of their work by third parties (which had been facilitated by the invention of printing), so also a recognition of performers' rights should arise out of the more recent technical changes. The quite general realisation of this fact has led to recognition of the need for defining performers' rights but has in no way prejudiced a decision concerning their character. The various doctrines which have been upheld on the latter subject may be briefly summarised as follows.

According to one theory, performers' rights are similar to authors' rights, or, better, are merely a single aspect of these. The performer who interprets a work of art is regarded as having created a new work stamped with his personality and possessing all the characteristics of an independent creation. It is true that to create this new work he uses existing material, that of the original work, but he uses it somewhat as a painter uses a natural landscape to prepare his picture. His creation is of a profoundly original nature and therefore has all the features required of the literary and artistic work protected by the Berne Convention.

Beside this extreme doctrine, which, it must be admitted, enjoys hardly any support to-day, there is another, according to which the performer should be considered, not as the author of a new work of art inspired by the first, but as a sort of collaborator in the original work. The work, according to this thesis, has remained incomplete ; it is inert, and cannot live and achieve completeness until the interpretative artist — who, like the author, contributes his personality — has given it the necessary aid. There are works which the creative artist can complete alone and immediately offer to the public (statuary, pictures, etc.). Others, such as music or the drama, need interpretation in order to be fully appreciated. If two successive contributions are required to bring the work to life in the fullest sense, then there has been collaboration ; and a collaborator is an author. As on the first assumption, but in a less absolute and more modest manner, the performer would then be entitled to claim the same rights as the original author.

Another doctrine, which has met with more favour (it has

been incorporated in certain legislative measures), regards the interpretative artist as one who adapts or alters the original work, the change undergone by the original when interpreted through the performer's artistic personality being considered as equivalent to an adaptation. It is worthy of note that adaptations are among the works protected in respect of authors' rights by Article 2, paragraph 2, of the Berne Convention, which provides that translations, adaptations, musical arrangements and other transformations of a literary or artistic work shall be protected in the same way as the original.

Moreover, it was in this light that the organisers of the Conference for the revision of the Berne Convention (Rome, 1928) seem to have regarded an artistic interpretation when they proposed that this should be protected within the framework of the Convention. The draft Article concerning performers' rights in respect of recorded music ran as follows :

" When a musical work is adapted to mechanical instruments with the aid of interpretative artists, the latter also shall benefit from the protection which the adaptation enjoys. "

Further, the explanatory statement accompanying the proposal to protect performers with regard to broadcasts says : " The introduction of protection of this sort has been opposed on the ground that the performance is not an original work of art and indeed that in order to be good it must abstain from any originality which may depart from the work to be performed. Nevertheless, a performance may deserve protection as a reproduction authorised by the author of the original work."[1]

This doctrine has also been upheld at many international congresses and in the hearing of cases brought before the courts in several countries by the gramophone industry. The manufacturing concern has claimed protection for its records, either considering itself to be the author of the adaptation which constitutes the record, or relying on the argument that the performer ceded to it, formally or tacitly, his rights as adapter.

The authors, on the other hand, through their national and international associations, have protested against the proposal to allow interpretative artists rights which might be assimilated, even if only on the same basis as adapters' rights, to those of authors. It will be remembered that they vigor-

[1] INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS : Documents of the Rome Conference (7 May-2 June 1928). Berne, Office of the Union, 1929, pp. 76-77 (in French only).

ously opposed any mention of such rights in the Berne Convention when it was revised in 1928, and they have even condemned the draft prepared for the next revision of the Convention, which only states, so to speak *pro memoria*, that the problem of the interpretative artist exists. They consider that any mention of the problem in a Convention dealing with authors' rights would run the risk of establishing an assimilation between two sorts of rights which they regard as fundamentally distinct. The performer is in their opinion in no way entitled to claim the protection given to the creator of a work of art, or to his collaborator, or to the person adapting or altering such a work.

There remains a doctrine on which compromise appears possible, and which has obtained fairly general approval so far among the persons concerned and among legal experts specialising in intellectual rights : it would base the legal justification of performers' rights on the notion of work done. According to this doctrine the essential point is that the performance represents the product of the interpretative artist's labour and that he is entitled to claim the full economic value of what he produces.

As long as the interpretation of a work of art could be given to an immediate and restricted audience only, no difficulty arose from the legal point of view as regards the conditions on which the performer consented to transfer the product of his labour. If he transferred it directly to the public, he himself fixed the price at which members of the public could " secure delivery " in the theatre or concert hall. If there was an intermediary — a theatrical producer, impresario, etc. — between the performer and the public, the performer was bound by a contract in which he figured as employee and which defined his obligation and the remuneration that he was to receive in exchange. The performer knew the use to which his work was to be put and the public for which it was destined. All was clear and could be the subject of contractual stipulation, whose enforcement both parties were in a position to guarantee.

All the conditions surrounding this contractual relation were completely upset by the introduction of the two new techniques — broadcasting and mechanical recording.

A first problem arose with regard to the rights which the contract conferred upon the employer. Having acquired, for remuneration, the product of the performer's labour, did the employer become the absolute proprietor of this product and was

he entitled to exploit it by all the means which the new inventions placed at his disposal ? In other words, was the performer, having transferred the product of his labour for a specified sum, to be content with this sum, whatever the additional value which the product might acquire thanks to the new inventions ? To quote a concrete instance, is a singer, engaged to perform in a theatre, entitled to claim additional remuneration, or — failing this — is he entitled to refuse to sing, if he finds that the director of the theatre has, for a certain sum, authorised the placing of a microphone on the stage ? No, said one party ; whether there is a microphone or not, the performer's work remains the same ; no additional effort is required of him ; he himself estimated the value of his work at a certain amount, and there is no reason to change this amount, for which the employer has acquired full ownership of the product of the performer's labour. Yes, replied the other party ; the contract was for work done under certain conditions, in a certain hall and for a certain audience ; in view of these conditions, the performer's work had a certain specified value ; if the conditions change, if the audience is considerably enlarged, then the economic value of the work has altered and the performer is entitled to plead that this value is no longer the same as was provided in the contract. The first problem to be solved regarding the relations between the performer and his employer was therefore to determine the respective rights of the two parties in the new situation set up by modern technique.

But a second problem also arose, involving persons other than the contracting parties. The great innovation of the new techniques is that they make the performer's interpretation an object which can be apprehended by third parties. Through broadcasting, for instance, the interpretation — made, with the performer's consent, into the microphone — is spread far and wide, and the sound waves which carry it can be used in a manner over which the terms of the contract have no control ; the original broadcast can be received for transmission to an audience by means of loud-speakers installed by third parties ; and gramophone records can also be prepared from it. Again, records made by a certain performer can be used not only privately — which is the normal intention, corresponding to the purchase price and to the remuneration received by the performer — but also publicly : they may be either included in the programme of a wireless station, or played on the

gramophone in such public premises as dance halls, cafés, places of entertainment, etc.; and the original records can be used by third parties for making reproductions.

In all these cases the product of the interpretative artist's work is threatened by abuse by third parties not signatories of the contract between the artist and the employer. Here, it should be noted, the interests of the artist and the employer coincide. Both are injured, the artist because by his contract he transfers the product of his labour to a single person and is entitled to expect that it will be normally used; and the employer because, once he has acquired and paid for this product, any use thereof by a third party to some extent deprives him of the advantages which he secured under the contract.

The doctrine that performers' rights are based on the notion of work done has met with considerable agreement in legal circles. Mr. Piola-Caselli was one of the first to develop it more fully. Only recently, before the Committee on Legislation of the International Confederation of Societies of Authors and Composers which met in Rome in April 1938, he made a point of showing that the notion of work done would provide performers' rights with a surer foundation than would the notion of a created or adapted work of art. Moreover, Mr. Beurdeley, Reporter to the International Association of Letters and Art for a Committee which had been instructed to study questions relating to performers' rights, wrote in 1933 : " The Committee, having analysed performers' rights, the principle of which it recognises both from a material and from a non-material point of view, held that the performer, by reason of his position as an employed person, cannot be considered as an author, and that his rights should be governed by provisions derived from labour law."

This is not the place to refer to the subtle legal analyses which theorists on intellectual rights conduct and have conducted on a subject that constantly provokes fresh discussion. It will suffice to point out that theories tending to change the foundation even of authors' rights are now current. The French Bill relating to authors' rights and publishing contracts, introduced in the Chamber of Deputies by the Minister of Education in 1937, clearly links authors' rights with the rights of workers[1];

[1] CHAMBRE DES DÉPUTÉS: *N° 3222. Rapport fait au nom de la Commission de l'Enseignement et des Beaux-Arts sur le projet de loi concernant le droit d'auteur et le contrat d'édition. Paris, 1937.*

and if such an assimilation is possible in the case of authors — in most cases independent creative artists — it is clearly even more true of performers, the large majority of whom are bound by contracts of employment.

Apart from any discussion on the essential character of artistic interpretation and on the psychological elements which may render such interpretation more or less similar to the creative work of an author, the above argument was amply sufficient to justify an application to the International Labour Office to intervene. Seen from this angle, the problem became one of a particular category of producers whose activity might be, and in fact usually was, governed by a contract of employment. The product of their labour had a certain economic value, which might vary according to the conditions in which this product was used. The goal was first of all to safeguard this economic value in the contract of employment and secondly to protect the contract itself against outside factors which might threaten its effectiveness.

It must be recognised that though the notion of work done provides a sufficient basis for the construction of a theory of performers' rights, these rights cannot be at all extensive unless the work constituting the artistic interpretation is recognised as having special characteristics. Only these special characteristics can justify certain of the claims made by performers, such as the artist's right to attach his name to his performance and to oppose its distortion.

A manual labourer's work may have a larger or smaller economic value according to his personal skill and degree of occupational training; the employer is able to judge the value of such work without outside appreciation, and may within certain limits, leaving out of account other factors resulting from supply and demand, accord a larger or smaller remuneration according to the value which he attributes to it. The performer is in a very different position, for an important element in the value of his work is the appreciation of the public.

Whereas a manual worker has no particular interest in making himself known to the consuming public and in seeing that the objects he creates are left intact (indeed, they can be altered or destroyed without prejudice to the economic value of his labour), the economic value of the interpretative artist's labour varies with his reputation and the favour he finds with the public. It is therefore most important to him that his

name should be attached to the product of his labour and that this should not be distorted or altered in any way which may harm him in the public's eyes. It is therefore not necessary to define the essential character of the relation between the interpretative artist and his interpretation, or to decide whether this relation is established by a projection of the artist's personality into his work or by a sort of indissoluble union between that work and its creator; in other words, there is no need to test, with regard to the interpretative artist, the theories by which the rights of authors have been explained. Simply to state the elements which make up the economic value of the interpretative artist's work will suffice to justify protection as regards these elements. Certain of the claims of artists, referred to above, such as the performer's right to attach his name to his performance and to oppose distortion, thus find a sufficient foundation in the need to protect the economic value of the artist's labour, without there being any need to introduce controversial ideas concerning the rights attaching to personality or to creative work.

Attempt at Regulation through the Berne Convention

While the legal theory of performers' rights was being elaborated and a few countries, urged by practical necessities, were passing legislation based largely upon it, the professional organisations concerned were seeking means of obtaining the international regulation that seemed necessary in this field. The problem had already been discussed in several international conferences, when in 1926 the first suggestion to entrust its study to an official international body was put forward; in that year the second congress of the International Union of Musicians, held in Paris, stated that " the question should be transmitted to the International Labour Office for examination and for preparation of a course of action to be recommended to all Governments ".

The idea of bringing the International Labour Office into this field was never subsequently abandoned. Indeed, as will be seen below, it gained force with the passage of time. But its progress was for a time suspended owing to an attempt to secure a regulation of performers' rights within the framework of the Berne Convention.

This, it will be remembered, is an instrument under which the Governments of the contracting countries formed themselves into a " union for the protection of the rights of authors over their literary and artistic works ", and undertook to apply a number of rules for the protection of these rights. Signed in 1886, the Convention has hitherto undergone three revisions, the latest at Rome in 1928. A fourth revision conference is to be held at Brussels, probably in 1940. A central body — the Bureau of the Union for the Protection of Literary and Artistic Works — was established at Berne ; it is required to " collect all kinds of information relative to the protection of the rights of authors over their literary and artistic works " and to " arrange and publish such information ". Each conference for the revision of the Berne Convention is prepared by the authorities of the country in which the conference is to be held, with the aid of the Berne Office.

Thus the Italian authorities prepared the 1928 Revision Conference, which was to be held at Rome, and, with the Berne Office, drafted a proposal to introduce into the Convention two clauses concerning performers' rights. One of these, relating more particularly to wireless broadcasting, would have secured that " artists who execute literary or artistic works enjoy the exclusive right to authorise the diffusion of their performances by means of telegraphy with or without wire, or any other process analogous thereto and used to transmit sounds or images ". The other, relating to instruments for the mechanical reproduction of music, provided that " when a musical work is adapted to mechanical instruments with the aid of interpretative artists, the latter also shall benefit from the protection which the adaptation enjoys ".

In the commentary attached to these proposals, the competent authorities referred to desires repeatedly expressed by congresses of interested parties, recognised the justification for these desires and dismissed objections of a purely theoretical nature. " New facts ", it went on, " necessitate new legal regulation. Legal theories must adapt themselves to present economic requirements. We therefore have no hesitation in recognising that the performance of an artist, when broadcast by wireless and acquiring thus an obvious commercial value, is a work of art. By authorising the wireless broadcasting of his performance the artist necessarily loses part of his auditors or spectators, and it is just that he receive compensation for this

loss." Later on, in the commentary with regard to the problem raised by recorded music, the views of the organisers of the Conference were expressed as follows : " It is indeed incontestable that gramophone records in particular owe a great part of their commercial value to the reputation of the performing artist, so that protection against the reproduction of the performance recorded on the disc is of considerable practical importance. We believe that legislation should be adapted to meet this necessity, even though in theory the transient art of a performer can hardly be compared with the work of a writer or a painter." It will be noticed that the question of the character of an artistic performance is not definitely resolved here. On the one hand, the competent authorities stressed the economic value which the new techniques have given such performances, and seemed to regard this as the basis for a new right. On the other hand, they had no hesitation in recognising the performance as a work of art — a recognition which, if accepted, would at once have enabled performances to be brought within the scope of works protected by the Berne Convention concerning authors' rights. Nor can the force of such an opinion be diminished greatly by the appended reservation concerning the transient nature of a performance (which was stressed in order to distinguish the art of performers from that of writers or painters), for the very reason that the new techniques have removed this transience and that a determining factor of the problem lies in the permanent character which performances have now acquired.

The two proposed new clauses met with vigorous opposition, not because the principle of protecting performers was objected to in itself but because it was held that no place could be found for such protection in a convention intended solely to safeguard the rights of authors. During the debate, indeed, it proved impossible to reconcile the various legal doctrines concerning the nature of the performance of a work of art. Certain theorists regarded interpretative performances as having to some extent the character of a creation, at least at second-hand ; others held that such creation had nothing in common with that of an author, or even that there was no creation whatever in an interpretative performance (see Appendix II). In any case the great majority of members of the Conference opposed the insertion in the Berne Convention of a clause settling the question and involving the formal

recognition of the similarity between performer's and authors' rights. Nevertheless, the Conference desired that this exclusion should not be interpreted as a condemnation of the principle of protection for performers, which might be embodied in an instrument other than the Berne Convention, and a resolution submitted by the Italian delegation was therefore adopted. In this the Conference expressed the desire "that the Governments which have participated in the work of the Conference should consider the possibility of action with a view to safeguarding the rights of performers".

In view of the difficulties encountered in obtaining a settlement within the framework of the Berne Convention, the International Labour Office took up the study of the whole problem soon after the Rome conference at the request of the parties concerned, and pursued it with the collaboration of the international organisations concerned with the question of performers' rights. Further reference will be made to this development on a later page.

Meanwhile, the preparation of the new Conference for the revision of the Berne Convention, which was to be held at Brussels in 1936, had also been proceeding. The Belgian authorities, which, with the Berne Office, were responsible for this preparation, proposed "to introduce in the Convention at least a statement of principle in favour of the protection of performers". This, they suggested, should take the form of a new Article 11 *quater* of the Convention, as follows :

"The interpretation of a work, whether or not the copyright for this work has expired, shall be protected in a manner to be prescribed by the internal legislation of each country of the Union."

The object of this new provision was merely to embody in the Convention the desire expressed by the Rome Revision Conference of 1928, which reminded Governments that performers' rights should be protected ; full latitude was thus left to the International Labour Organisation to decide the terms of any international regulations.

In an important memorandum issued in 1935, the Rome International Institute for the Unification of Private Law dealt as follows with the subject of the above draft provision[1] :

"The proposed new Article 11 *quater*, with the amendment to which we have referred, would constitute a first step towards the international protection of performers and a standardisation of national

[1] INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW : *Droit des artistes exécutants*. Rome, September 1935.

laws in this connection. . . . Moreover, in accordance with the procedure of international labour Conventions drafted by the International Labour Organisation, the principles of an international regulation of the rights of performing artists should take the form of an international labour Convention and thus be imposed on national legislation for embodiment in and enforcement by the latter."

However, the hostility of authors to any mention of performers' rights in the Berne Convention did not diminish; they regarded the drafting of the proposed new paragraph as anything but harmless; indeed, they saw in its lack of precision a menace to themselves, in that it left the way open to regulations which they considered would be prejudicial to authors' rights. They therefore repeatedly expressed their opposition.

The Eighth Congress of the International Confederation of Societies of Authors and Composers (Copenhagen, May 1933) unanimously considered that the question of performers' rights was not within the competence of the Berne Convention and adopted a resolution for transmission to the International Labour Office; this closed as follows : " that the officers of the Confederation keep in touch with the International Labour Office, to which the study of the problem of protecting performing artists has been allotted. "[1] The next year, at its Warsaw Congress, the Confederation noted with satisfaction that the idea of dealing with the matter inside the framework of the Berne Convention had apparently been dropped and that the International Labour Office was considering the preparation of a labour Convention on the subject. Returning once more to the matter at its Tenth Congress (Seville, 1935), the Confederation confirmed the Copenhagen resolution and again vigorously objected to the mention of performers' rights in the Berne Convention.

On its side, the International Association of Letters and Art[2], at a general meeting (Montreux, 1935) held with the object of examining the programme of the impending Conference for the revision of the Berne Convention, unanimously rejected any recognition of performers' rights in the Convention and adopted the following resolution :

" It is demand that the Brussels Conference should express the following demand : 'That national organisations representing authors

[1] *Inter-Auteurs* (organ of the International Confederation of Societies of Authors and Composers), No. 33, p. 516.

[2] This Association, which comprises prominent legal experts on questions of authors' rights, has for over fifty years been conducting a vigorous campaign in the matter and in fact initiated the movement for the international protection of these rights.

and literary and artistic works protected by the Berne Convention be permitted to follow the proceedings of the International Labour Organisation in connection with the preparation and possible adoption of an international labour Convention concerning the rights of intellectual workers belonging to the class of interpretative and performing artists[1]. "

Faced by the unwavering opposition of the authors, the Berne Bureau for the Protection of Literary and Artistic Works decided with regret to drop its original proposal concerning performers' rights[1]. This, it will be remembered, was to treat performers in the Convention " as if they were authors and to allow them means of redress similar to those available to authors ".

Nevertheless, the question of performers' rights will certainly be raised during the discussion of the proposed new Article 11 *quater* at the next Conference for the revision of the Berne Convention. The draft was submitted to the different Governments, for their observations, with the agenda of the Conference, and the replies were published by the Berne Bureau for the Protection of Literary and Artistic Works in February 1936[2]. Some Governments refrained from expressing any opinion on so controversial a question, others proposed amendments to draft Article 11 *quater*, while others suggested either a new procedure, for instance, the preparation of a special Convention within the framework of the International Union for the Protection of Literary and Artistic Works (Austria), or the submission of the whole problem to the International Labour Organisation (France). The reply of the French Government was as follows :

" The French Government continues to consider that interpretative and performing artists are not creators of intellectual works and that the international protection which is due to them — a protection which is at present the subject of study and proceedings by the International Labour Office of the League of Nations — should on no account be introduced into the Berne Convention, which is intended to protect the rights of creators of literary and artistic works. It therefore opposes the insertion in the Berne Convention of a text such as that of Article 11 *quater* and proposes the rejection of this text.

" Further, owing to the fact that it is of considerable interest for creators of literary and artistic works to follow the work of the International Labour Office with regard to the protection of the rights of interpretative and performing artists, the French Government

[1] *Le droit d'auteur*, 47th year, No. 1, January 1934, p. 10.

[2] INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS : *Propositions, contre-propositions et observations présentées par les administrations des pays de l'Union*, Berne, 1936. 60 pp. (in French only).

desires adoption of a motion the text of which has already been drafted by the authors of the Montreux resolutions and which the Government now puts forward in its own name[1] ".

The International Broadcasting Union has also expressed its view, as follows :

" The International Broadcasting Union opposes extension of the idea of authors' rights to persons other than those who create the works in question. Settlement of the question of performers' rights should not involve protection within the framework of authors' rights as these are at present defined by the Berne Convention. This question being now before the International Labour Office for examination, the International Broadcasting Union is of opinion that the proposed Article should not be introduced into the Convention."

It is highly probable that the objections of principle and the various obstacles in the way of any mention of performers' rights in the Berne Convention, which had appeared at the Rome Conference for the revision of this Convention in 1928, will recur at the Conference of Brussels. At any rate, the performers', authors' and composers' organisations and the other parties concerned, in particular the International Broadcasting Union, have clearly expressed their preference for a solution by means of an international labour Convention and for action through the International Labour Office, as already undertaken. An account will now be given of this action and of the decision taken by the Governing Body of the Office to place the question of performers' rights on the agenda of the International Labour Conference.

The Question of Performers' Rights before the International Labour Organisation

Preliminary Steps

The first appeal was addressed to the International Labour Office on this subject in 1926. It was in that year that the Congress of the International Union of Musicians called upon the International Labour Office, as stated earlier in this Report,

[1] The motion to which the French Government refers is that adopted at Montreux in 1935 by the International Association of Letters and Art, reproduced above.

to go into the problem of performers' rights with a view to its solution.

The movement in favour of such action by the International Labour Office was interrupted for a time by the Rome Conference for the revision of the Berne Convention (1928) and the attempt to deal with the problem within the framework of this Convention; but after the failure of that attempt, it gathered strength steadily.

The Third International Stage Congress, held at Barcelona in June 1929, voted a resolution in which, having stated a number of the claims of performers, it demanded that the question should be "transmitted to the International Labour Office for examination and for preparation of a course of action to be recommended to all Governments".

In September of the same year the Congress of the International Confederation of Professional Workers at The Hague laid down certain principles relating to performers' rights and concluded by resolving :

"That the Secretariat-General, having consulted the groups concerned and co-opted all necessary experts, prepare a draft for an international Convention, based on the principles stated above, respecting authors' rights, and constituting a new body of performers' rights; and that having submitted the draft to the National Confederations of Professional Workers, the Secretariat-General transmit it to International Labour Office with all the necessary documents and reports."

The Secretary-General of the International Confederation of Professional Workers, Mr. Gallié, in a memorandum transmitted to the International Labour Office, having stressed the necessity of preserving intact and even of extending the protection of authors' rights as laid down in the Berne Convention, insisted on the urgent character of the problem of performers' rights which was embodied in the resolution adopted at the last Congress of his organisation. He concluded as follows :

"The opinion of the International Confederation of Professional Workers on this important question is thus clearly laid down : though performers' rights may in no case be confused with authors' rights, it is nevertheless necessary that new and special rights be called into existence, for performers and interpretative artists, in respect of the mechanical reproduction of their performances or interpretations; these rights should be not only material but also non-material. It is now urgently necessary that the International Labour Office take up the matter, and that the Office's Advisory Committee include the question in its agenda so that it can recommend the Governing Body to place the question on the programme of the International Labour Organisation's immediate tasks."

STUDIES CARRIED OUT BY THE INTERNATIONAL LABOUR OFFICE

Following on these various moves the question of performers' rights was placed for the first time on the agenda of the Advisory Committee on Professional Workers[1] in December 1929. The International Labour Office had prepared a preliminary report, after consulting the professional workers' and performers' organisations, and had obtained the collaboration or support of such institutions as the Berne Office for the Protection of Literary and Artistic Works, the International Wireless Committee and the International Broadcasting Union. The examination of this question by the Advisory Committee, which could only be of a preliminary character and could do no more than open the door for more thorough study, led to the adoption of the following resolution :

" The Committee, having taken note of the report prepared by the International Labour Office on the rights of performers in connection with broadcasting and mechanical reproduction, and having noted the demands put forward by performers on the subject of these rights, and considering that the problems thus raised can be solved only on an international basis, with due respect for the rights already accorded to authors and composers, and that they call for the drafting of a new code of rights,

" Requests the Governing Body to instruct the International Labour Office to carry out a thorough investigation, with the collaboration of the International Committee on Intellectual Co-operation of the League of Nations, and the International Institute for the Unification of Private Law, and such other bodies as it finds necessary."

Before deciding on the effect to be given to this resolution, the Governing Body examined a further report from the International Labour Office, in which the Office set out the opinions of the various institutions and organisations regarding the necessity and possibility of international regulations. All the organisations consulted had been in favour of such regulations, particularly the International Association of Letters and Art, a body well known for its work in the field of authors' rights. The Council of the International Broadcasting Union, which comprised a very large majority of wireless undertakings, also

[1] The Advisory Committee on Professional Workers was set up by the Governing Body of the International Labour Office in 1928 for the study of all questions relating to the economic and social conditions of professional workers. It is composed of three representatives of the Governing Body, two representatives of the International Committee on Intellectual Co-operation, and representatives of employers' and professional workers' organisations.

declared that it " would be as gratified as performers if it were possible to find an international solution which would be both reasonable and fair to both parties ".

The Governing Body took note of the results of this enquiry and of certain urgent resolutions, such as those of the Fourth International Legal Congress on Wireless Telegraphy and Telephony (September 1930), which expressed " the desire that the International Labour Office continue the study of performers' rights with regard to broadcasting and mechanical reproduction, with a view to arriving at an international Convention in the near future ". At its Fifty-second Session in April 1931 the Governing Body approved the above resolution of the Advisory Committee on Professional Workers, expressing the desire that the International Labour Office should continue its work in collaboration with the international institutions dealing with intellectual rights[1]. A meeting of these institutions was contemplated with a view to defining the share to be allotted to each in the study of the problem. Such a meeting was held in Paris in March 1931 and was attended by representatives of the Secretariat of the League of Nations, the International Institute of Intellectual Co-operation, the Berne Office for the Protection of Literary and Artistic Works, the International Institute for the Unification of Private Law (Rome) and the International Labour Office. The meeting agreed in recognising the full competence of the International Labour Office as regards performers' rights. The minutes of this part of the meeting, which were passed by the International Committee on Intellectual Co-operation in April 1931, were as follows :

" *Performers' Rights.*

" This problem should be considered as essentially within the competence of the International Labour Office. The Office has undertaken and will continue investigations on the problem. If such is the decision of its Governing Body, the problem submitted for examination to the Advisory Committee on Professional Workers may either be the subject of an international labour Convention or

[1] The help of the competent international institutions — the International Institute of Intellectual Co-operation, the Secretariat of the League of Nations, the International Office for the Protection of Literary and Artistic Works and the International Institute for the Unification of Private Law — has been most valuable to the Office. By the expression of their opinion during the various enquiries, by the preparation of memoranda and by the adoption of resolutions in their governing bodies and advisory organs, they have made an important contribution to the study of the problem and to the search for a solution.

be sent to the Conference for the Revision of the Berne Convention on the Protection of Literary and Artistic Property. The International Labour Office will ask for the assistance of the International Bureau at Berne, the International Institute at Rome for the Unification of Private Law and the International Institute of Intellectual Co-operation."

The Advisory Committee on Professional Workers met for its third session in May 1931. It took note of a report from the Office and heard the views of experts whose it had convened with this object, including one from the International Broadcasting Union. The Committee was convinced of the necessity of protecting interpretative artists on an international scale, but did not consider itself in a position to draft full and exact proposals for the necessary regulations without a comprehensive consultation of the various parties concerned; it therefore requested the appointment of a joint Sub-Committee, which would be instructed to continue discussion of the different points of possible international regulations and to proceed to such consultation as it might find desirable.

The Governing Body approved the establishment of this Sub-Committee, which was composed of Mr. Jules Destrée, chairman, Mr. Marchesi (substitute for Mr. Olivetti), representing the employers, and Mr. Louis Gallié, representing professional workers, and began its work in June 1932. The Sub-Committee consulted some fifty organisations belonging to the different parties concerned as well as a number of competent legal experts and institutions. This consultation enabled it to submit proposals to the Advisory Committee at the fourth session of that body in November 1933. The Advisory Committee discussed and finally adopted these in the form of a list of principles, which it submitted to the Governing Body of the International Labour Office as a possible basis for international regulations relating to performers' rights; on the ground that the question was ripe for such regulation, the Governing Body was requested to consider the possibility of placing it on the agenda of a session of the International Labour Conference.

At its Sixty-fifth Session in January 1934, the Governing Body adopted the Committee's report and it was thenceforward understood that the question of performers' rights figured on the list of questions which might be included in the agenda of the International Labour Conference.

The Problem placed on the Agenda of the International Labour Conference

When in 1935 the Governing Body had to decide on the agenda of the 1937 Session of the International Labour Conference, it considered the possibility of including the question of performers' rights. In view, however, of the number and urgency of the items already suggested, it was compelled, at its Seventy-fourth Session (February 1936), to postpone the inclusion of this question.

The disappointment among professional workers caused by this adjournment led first the officers of the Advisory Committee on Professional Workers and then the Committee of international institutions dealing with intellectual rights to make representations to the International Labour Office. The Council of the League of Nations approved the relevant resolutions of the last-named Committee and of the International Committee on Intellectual Co-operation and requested the Secretary-General of the League to transmit these to the Office.

The Governing Body, wishing to overcome all the difficulties which might yet arise and to place the question on the agenda of the International Labour Conference under conditions which would permit of a more rapid treatment, then decided (February 1937) to appoint a Committee of Experts, to undertake a preliminary examination that would facilitate the work of the Conference.

This Committee, the composition of which was determined by the Governing Body in February 1938, consisted finally of representatives of the international institutions dealing with intellectual rights (the Secretariat of the League of Nations, the International Institute of Intellectual Co-operation, the Berne Office for the Protection of Literary and Artistic Works, and the Rome International Institute for the Unification of Private Law) and a number of experts appointed in agreement with organisations concerned, such as the International Broadcasting Union, the International Federation of the Phonographic Industry, the International Organisation of Industrial Employers, the International Confederation of Societies of Authors and Composers, and associations of performers. It met on 28 and 29 November 1938. As will be seen from the summary of its proceedings given in Chapter III of this Report, the representatives of the different institutions were able to

agree on a number of principles capable of serving as the basis of a scheme of international regulation. The representatives of performers, authors, the phonographic industry and broadcasting institutions reaffirmed their desire to establish for performers a status corresponding to their present position and found it possible, thanks largely to the long preparatory discussions of previous years, to reach speedy unanimity on many important points.

The Governing Body of the International Labour Office, when the question again came before it at its Eighty-sixth Session (February 1939), together with the conclusions of the Committee of Experts, decided to place the question of performers' rights as regards broadcasting, television and the mechanical reproduction of sounds on the agenda of the Twenty-sixth (1940) Session of the International Labour Conference, to be dealt with by the double-discussion procedure.

CHAPTER II

EXISTING REGULATIONS

§ 1. — National Law and Practice

The rights of performers have been made the subject of legislative measures in some ten countries. It rarely happens that a law is devoted exclusively to this question, but provisions regarding it are included in various more general Acts concerning intellectual rights. A survey will now be made of the legislative measures in question, of certain Bills submitted to Parliaments or under examination by the parties concerned, and of various legal decisions.

Argentina

The rights of artistic performers are regulated by section 56 of the Act of 30 September 1933 concerning literary and artistic property ; the section is as follows :

" *Performers*

" *Section 56.* — A performer interpreting a literary or musical work shall be entitled to remuneration for his interpretation, whether broadcast or retransmitted by wireless telephony or television or engraved or printed on a record, film, band, cloth or any other substance or body suitable for the reproduction of sounds or images. If the amount of the remuneration cannot be decided upon by agreement, it shall be fixed by the competent judicial authority by means of summary procedure.

" An interpreter of a literary or musical work may forbid the diffusion of his interpretation if it has been reproduced in such a way as to involve the risk of injuring his interests as an artist seriously and unjustly.

" In the case of performances by choirs and orchestras, the right of forbidding diffusion belongs to the choir-master or conductor.

" Without prejudice to the author's right, a work performed in a theatre or public hall may be broadcast or retransmitted by wireless telephony or television on the sole authorisation of the organiser of the performance. "

The Argentine Act thus gives the performer, not a general right to authorise or refuse to authorise the diffusion of his interpretation, but only the moral right to oppose such diffusion if the reproduction is likely seriously to injure his interests.

On the other hand, it confirms his right to remuneration in the spheres of wireless telephony and sound recording.

Commenting on this Act in *Inter-Auteurs*, the bulletin of the International Confederation of Authors' and Composers' Societies, Mr. Alfredo Colombo writes :

" The important question of the rights of performing and interpretative artists may be regarded as the burning issue of the day. It is being studied from the point of view of legal theory and of positive law by the most eminent jurists . . . while its practical, economic, and ethical aspects are commanding the attention of the producers of gramophone records and films, authors' associations for the collection of performance dues in every country, the International Confederation of Authors' and Composers' Societies, the Artistes' and Performers' Society, and — even more important — the International Labour Office, through interested groups and through the International Institute of Intellectual Co-operation . . . Argentina solves the problem in a clear and precise manner, within the framework of the Act concerning intellectual property, leaving undefined the nature of the right and giving it the economic and moral content now generally admitted as right. "[1]

Belgium

No legislative measure has yet been introduced for the protection of performers. In 1929 Mr. Jules Destrée, former Minister and member of the Advisory Committee on Professional Workers of the International Labour Office, introduced in the Chamber of Deputies a Bill granting performers the sole right to authorise the recording or broadcasting of their interpretations. This right was limited, however, by a provision stipulating that if the performer withholds authorisation without there being any " serious " reason for opposing the recording of the broadcast, his refusal may be disregarded " provided that he be given fair compensation ". Disputes regarding the importance of reasons for refusal were to be settled by arbitration. The performer, even after due compensation had been paid, retained a moral right in respect of his work, namely the right to forbid its transmission or retransmission in a form likely to injure his reputation.

This Bill has now lapsed.

Czecho-Slovakia

The Act of 24 November 1926 concerning authors' rights in respect of literary, artistic and photographic works contains an interesting section relating to the rights of performers :

[1] *Inter-Auteurs*, November 1933, pp. 607-608.

" *Section 9. — Author, Adapter.*

" (1) The author of a work shall mean the person who created it. The author of an adaptation (adapter) (section 7) shall mean a person whose activities have resulted in producing an adaptation of a personal character.

" (2) Except as otherwise specified, the adapter of a work for screen production shall be held to be the director; in the case of the adaptation of a work for instruments or apparatus for mechanical reproduction, he shall be the person who performs such adaptation or, in the case of choral or orchestral adaptation, the person who conducts it (conductor), and in the case of the transposition of the work by its technical arrangement for reproductive machinery or parts thereof, the person whose activity determines the nature of the reproduction."

It will be seen that the Czechoslovak legislation, like that of several other European countries, is based on the principle that the performer is to be regarded as an adapter, and accordingly grants him a certain measure of protection in the sphere of mechanical reproduction.

Finland

Section 5, subsection 1, of the Copyright Act of 1927 provides that " the transposition of an artistic performance of a written or musical work to a mechanical instrument for the reproduction of sound shall be considered to be an adaptation, and the performer shall be regarded as the author of the adaptation ". By this provision the Act gives the performer the same protection as that accorded to authors at second hand.

France

LEGAL DECISIONS

(*a*) According to a decision pronounced by the Council of State on 20 November 1931, the failure of a State broadcasting station to inform the public that music broadcast was gramophone music constitutes a serious offence, but it is for the artist concerned to prove consequent injury[1].

Commenting on this decision, *Le Droit d'Auteur*, the organ of the Berne Bureau of the International Union for the Protection of Literary and Artistic Property, asserts that the case raised no question as to the rights to be given to performers, but simply a question of responsibility. " Nevertheless ", the commentator goes on, " if it be agreed that a performer

[1] *Revue juridique de radio-électricité*, Vol. VIII, No. 32, 1932, p. 351.

is in principle entitled to protest against the defective reproduction of his performances by wireless, he should *a fortiori* be protected when his higher interests are at stake — for example, when one of his interpretations is used in public without his consent "[1].

(*b*) By a decision of 9 November 1937 the Civil Court of the Seine (18th Division) dismissed a performer's claim against a wireless station which had broadcast without his consent the sound-record of a film carrying his interpretation, on the ground :

" That Mr. M. could have restricted, when concluding his contract, the rights granted in respect of his interpretation ; and having failed to produce proof of the conclusion of a special agreement relating to this question, he cannot claim that any breach of contract has been committed to his prejudice ;

" That from the pecuniary standpoint the rights of artistic property protect only the authors of a work and not its actors or performers ;

" That in the present state of the law the same applies to interpretations recorded on gramophone records or the sound-bands of films, the performer being deemed to have alienated all further pecuniary rights on receiving remuneration for the recording of his voice. "

Mr. F. Erlanger, commenting on this decision in the review *Geisliges Eigentum*, writes :

" We do not hesitate to applaud this judgment if it affirms that authors' rights protect only the creators, and not the actors or performers, of a work. But this is by no means the same as depriving the performer of all rights in respect of his performance. The modern trend in the evolution of authors' rights is definitely in the direction of attributing certain rights to the performing artist ".

Germany

Performers' rights are governed by the Copyright (Amendment) Act of 22 May 1910, which amended the Copyright Act of 1901. The amending Act adds to section 12 of the principal Act a new subsection — subsection 2 — which is as follows :

" The author of a work shall mean the person who has written it. In the case of a translation, the translator, and in the case of an adaptation, the adapter, shall be considered as the 'author'.

" If a literary or musical work is recorded by means of a personal performance before a device for use in connection with instruments for the mechanical reproduction of sound, the record thus made shall be considered equivalent to an adaptation of the work. The same shall apply to recording by perforation, stamping, punching, the

[1] *Le Droit d'Auteur*, 15 April 1933, p. 47.

fixing of pins and staples, and similar processes, if such recording can be regarded as an artistic activity. The following shall be considered as an adapter : (*a*) the performer, in the case referred to in the first sentence of this paragraph ; (*b*) the person who effects the recording in the case referred to in the second sentence."

It will be seen that the German Act reflects the view that the performer, although not the true author of the work, may, as adapter, be assimilated to the author, since his adaptations, though not original, have the characteristics of a real creation. The clause in question relates, be it noted, not to broadcasting but only to recording.

One case, however, was left unsettled : since the performer has rights which are virtually authors' rights over his records in his capacity of adapter, what is the position when these records are broadcast ? Section 22(*a*) of the Act settled in the negative sense the case of public auditions given by means of gramophone records, by providing that such auditions may take place without the permission of the authors and hence without that of the performers. But at the time of the drafting of the Act broadcasting had not reached a very advanced stage of development and did not raise points of law. The public auditions envisaged in section 22 (*a*) were given simply by means of gramophones placed directly before the audience. Should a broadcast be regarded as a public audition, and thus be exempted from the requirement of the author's — and hence the performer's — permission ? The solution of this problem was attempted in a series of legal decisions of which the conclusions will be given on a later page.

Towards 1930 it became clear that the copyright legislation as a whole had ceased to correspond to modern conceptions and legal doctrine. A Bill for its reform was therefore prepared and published in 1932 by the Reich Ministry of Justice[1].

The new scheme abandoned the system of protection for the performer based on the assimilation of adaptation and rearrangement to authorship, and would have created for him a special right based, apparently, on the notion of the personality of the interpretative artist ; it provided that this right should not prejudice that of the author. The protection afforded would be greater than that provided by the 1910 Act inasmuch as the performer's consent would be necessary not only for

[1] REICHSJUSTIZMINISTERIUM : *Entwurf eines Gesetzes über das Urheberrecht an Werken der Literatur, der Kunst und der Photographie, mit Begründung.* Berlin, 1932.

the recording of his work but also for its broadcasting. The performer's right in the latter respect was, however, to be limited by a provision to the effect that théatrical performances might be broadcast with the sole consent of the impresario.

As regards the broadcasting of records — a question which the Act of 1910 did not settle but left, with a fairly large degree of latitude, to be dealt with by the courts — the 1932 Bill stipulated clearly that the broadcasting of a work recorded by a sound-recording instrument would not require the performer's consent, provided that the record had been placed in circulation lawfully. On the other hand, the protection of the performer was ensured in the case of a public audition given by means either of an appliance producing recorded music or of a wireless broadcast delivered through loud-speakers. In short, the 1932 Bill proposed that performers should be given the right to authorise the broadcasting and recording of their interpretations and the distribution to the public of the records made[1].

Legal Decisions

As has already been shown, the performer's rights in respect of the recording of his work are established by section 12, sub-section 2, of the Copyright Act of 1910. But the extent of these rights remained in doubt, particularly in respect of the broadcasting of records by wireless.

This problem had to be faced by the courts in connection with disputes between record manufacturers and broadcasting organisations. The record manufacturing companies, in attempting to obtain the prohibition of the broadcasting of their records, based their case on the rights of performers as defined by the Act of 1910, arguing that they were recognised either formally or tacitly as concessionaries of these rights. Among the legal decisions in these cases mention must be made of that of the Berlin District Court *(Landgericht)* of 28 May 1935[2], that of the Court of Appeal *(Kammergericht)* of 10 February 1936[3], and, above all, that of the Supreme Court *(Reichsgericht)* of 11 November 1936[4].

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[1] A new Bill, drafted quite recently by the Academy of German Law, and which it has been impossible to take into account in the body of the present report, appears still further to accentuate the tendency to distinguish between performers' rights and authors' rights and to base the protection granted to the former on the special character of the performer's interpretative function.

[2] *Le Droit d'Auteur*, 15 November 1935, p. 126.

[3] *Archiv für Urheber- Film- und Theaterrecht*, 1936, p. 386.

[4] *Ibid.*, 1937, p. 690.

The first two of these decisions, after recognising the right of performers as established by section 12 of the 1910 Act, which treats the performer (as adapter) on the same footing as the author of a work, made it clear : (1) that in virtue of section 22 (*a*) of the Act the consent of the author — and hence that of the performer — is not required for public auditions given by means of sound-reproducing appliances ; (2) that a broadcast should be considered as a public audition ; and (3) that consequently broadcasting organisations may use records in their programmes without obtaining the consent of the composer or the performer, or the manufacturer representing them.

The Supreme Court, on the other hand, did not accept the assimilation of broadcasts to public auditions and therefore refused to include this new means of presenting music to the public among those exempted from the requirement as to the author's and performer's consent. Its judgment interpreted the Act of 1910 as protecting the performer not only against the unauthorised recording but also against the unauthorised broadcasting of his interpretations.

It must be noted, however, that all three courts considered the performer as transferring his right tacitly to the manufacturer recording his work :

" A tacit agreement (the Supreme Court declared) must be assumed to exist when a performer is employed temporarily for remuneration by a manufacturer and when a record is produced to be sold by the latter. The obligations underlying the transfer are created, in the second place, by the contract of service, and the remuneration is included in the sum paid for the performance. The manufacturer seeks, from the outset, to acquire the 'adaptation rights', since without them he is unable to make commercial use of the records. The performer may also be assumed to desire to transfer his rights over the finished record to the manufacturer at the moment of recording, particularly as he knows that it is the manufacturer who must place the record on the market. This interpretation, which takes into account the purpose of the contract, is still valid to-day, although performers, under the guidance of their professional advisers, have become more careful than before in the defence of their interests as regards copyright (and similar rights)."

The wireless broadcasting organisations having claimed that performers could not cede their rights to the manufacturers of records because they had already ceded them to the associations collecting authors' fees, the Court of Appeal, and then the Supreme Court, declared that examination of the model standard contracts drawn up by these associations showed them to be concerned only with the rights of authors in the strict sense, and not with those of performers.

The decisions of the courts then, after ascribing extensive rights to performers under the 1910 Act, laid down that in the absence of provisions to the contrary these rights should be considered as transferred by tacit agreement to the manufacturers who record their performances.

Section 66 of the *Austrian* Act of 9 April 1936 concerning literary and artistic property and rights connected therewith gave the interpretative artist the exclusive right to record his performance by means of a recording device, either directly or through the wireless, and to have such records reproduced and put into circulation. In the case of a performance by a group of persons (choir, orchestra) the right in question belonged to the conductor and the soloists. Performances due to the initiative of an organiser might not be recorded without his permission. The question whether, in this latter case, the performers were obliged to give their consent, and the question of their special remuneration, were left to be determined by the contract between the organiser and the performer. In any case, however, performers were to be informed in advance of any projected recording, even if they were bound by contract to take part in it. The period of validity of the rights accorded to performers was fixed at 30 years counting from the date of the performance.

The right of the performer to have his name mentioned was guaranteed for the duration of the performer's life, and for a period of 30 years from the date of the performance in case of the performer's death within such period.

The Act permitted any person to record broadcast performances for his personal use, on condition that the record was neither reproduced and circulated nor used for broadcasting.

As regards the right of authorisation, the provisions outlined above in connection with recording were applied also to broadcasting. Recorded performances, however, might be broadcast without special authorisation, and such broadcasting was prohibited only in the case of records made for personal use.

Public auditions given by means of the amplification through loud-speakers of interpretations broadcast with the due authorisation of the parties concerned were permitted without the special permission of these parties.

Special provisions (sections 81-93) determined the amount of the compensation and the penalties to be awarded for contravention of the Act.

The whole scheme of this Act, which went very far in protecting performers' interests, may thus be seen to rest on the principle of the right of authorisation. All other rights were derived from this general right, for clearly if the performer can withhold his authorisation, he can obtain in exchange for it such conditions, in respect of pecuniary remuneration and technical supervision, as he may judge necessary.

It should be noted that the Act of 1936, though not formally giving the performer the rights of an author, or even of an adapter, of a work, as did the earlier Act, nevertheless created for him a new right, which, as regards both its character and the penalties provided for its violation, closely resembled authors' rights. It gave performers that exclusive right of authorisation which is the cherished privilege of authors.

The Act, in short, gave performers very extensive rights in respect of the recording and broadcasting of their work, but not in respect of the broadcasting of their recordings.

Great Britain

The Dramatic and Musical Performers' Protection Act of 1925 is the earliest legislative measure devoted to the problem of performers' rights. It deals only with sound recording, and leaves aside the question of broadcasting; but, within the scope of its application, it gives full right of authorisation to the performer. This right — provided that the parties concerned are in a position to secure its full observance — obviously confers positive advantages on performers, of both a pecuniary and a non-material character.

The Act forbids the making of records of musical or dramatic performances, whether directly of indirectly, without the consent of the performers (section 1). " Record " is defined as meaning any record or similar contrivance for reproducing sound.

The Act further prohibits the sale, hiring, distribution for purposes of trade, or use for the purpose of a public performance, of any record made without the consent of the performer.

It will be noticed, further, that by mentioning indirect reproduction the Act prohibits unauthorised recording by means of telephonic transmission, wireless or otherwise.

The 1925 Act is certainly of importance to performers. British performers complain, however, that it does not deal with the question of the transference of rights.

Hungary

Section 8 of the Copyright Act of 1921 protects translations and adaptations, including those made by means of artists' performances with a view to the mechanical reproduction of the work, in the same way as original works. This provision, which would appear to give the performer a fairly large measure of protection, has been made the subject of many judicial decisions. The term " adaptations " in the Act has been interpreted by some as referring only to those which, thanks to the personal work of the interpretative artist, virtually give the original work a new form. A reliable basis for the interpretation of the Act was provided by a judgment pronounced on 24 May 1935 by the Hungarian Royal Curia.

An account is given below of this judgment, which interpreted the existing legislative provisions in a manner of considerable importance from the point of view of performers' rights. The recognition of the performer's right of authorisation has led to the establishment in practice of both pecuniary and non-material rights. Thus the broadcasting of a performance gives rise to special compensation. In Budapest half the sum paid by the broadcasting organisation is distributed among the artists taking part in the performance, in proportion to their pay. The consent required for the broadcasting of a performance is given, in the case of a theatre, by its management, which is deemed to have obtained the consent of the performers.

As regards non-material rights, any unfair omission or incorrect indication of the performer's name on the instrument for the mechanical reproduction of music (records, etc.) or in a wireless broadcast is considered to be an infringement of personal rights and may give rise to proceedings as if it were an infringement of copyright.

Further, the right of authorisation recognised as belonging to performers appears to make it possible by degrees to establish certain rules concerning the duration and cession of rights.

Legal Decisions

A gramophone-record manufacturing company having attempted to prevent the Hungarian broadcasting organisation from making use of its records, and having based its claim in the matter on the rights alleged to have been ceded to it by the performers, the Hungarian Royal Curia was led to define

the rights of the latter as regards the use and commercial exploitation of their work. The Curia was of the opinion that section 6 of the Copyright Act of 1921 gave the performer the exclusive right of authorisation in respect of the recording, reproduction, publication and sale of his work recorded on discs, films or other similar devices, and in respect of its direct communication to the public by means of broadcasting; but that authorisation to record an interpretation on a recording device implied, in the absence of provisions to the contrary, authorisation to reproduce this device, play or operate it, and place it on sale.

As regards the question whether a recording of a performer's work may be broadcast without his consent, the Curia held that the Act did not permit the assimilation to this extent of the performer's to the author's rights, and that the artist should not be given wider rights than the author of the words of a musical work, whose consent is not required for the broadcasting of the work.

The position of the performer under the Copyright Act, therefore, may be defined as follows : the performer has the exclusive right of authorisation in respect of the reproduction, publication and circulation of his recordings on discs, films, etc., and of the direct broadcasting of his interpretations; his consent is also required for recordings through the intermediary of broadcasting; it is not required, however, for the playing in public, or the broadcasting, of records of his interpretations lawfully placed in circulation[1].

Italy

The rights of performers are governed by the Act of 14 June 1928 supplemented by the Legislative Decree of 5 December 1938. The Act leaves aside the question of recording and deals exclusively with broadcasting. It provides that broadcasting organisations are entitled to transmit, without the consent of the performers, artistic performances given in concert halls, etc., in exchange for which they must pay fair compensation to the holders of the rights in accordance with the provisions of the Regulations issued under the Act (section 4).

Among the holders of the rights in question, the Regulations mention

(*a*) impresarios and entertainment undertakings;

[1] *Le Droit d'Auteur*, 15 November 1935, p. 129; *Inter-Auteurs*, No. 53, June 1935, p. 60.

(*b*) conductors, principal artists, performers, soloists in concerts, and actors;

(*c*) orchestras, choirs, and musical societies.

The compensation to be paid is to be fixed as a percentage of the actual cash receipts obtained from the performance and the broadcast.

In the case of theatrical productions, one-third of the percentage fixed is payable to the producer or entertainment undertaking, and two-thirds to the parties mentioned under (*b*) and (*c*), to be distributed among them proportionately to the remuneration received by each for his part in the performance.

In the case of concerts, three-fifths of the percentage fixed is due to the impresario or entertainment undertaking and two-fifths to the parties mentioned under (*b*) and (*c*), to be distributed among them as in the case of theatrical productions.

The percentage is fixed by the impresario or the entertainment undertaking, acting either in his or its own name or on behalf of the other holders of the rights, in agreement with the representatives of the broadcasting organisation. The rate thus fixed is deemed to have been accepted by all the parties of categories (*a*), (*b*), and (*c*).

The settlement of disputes is entrusted to an arbitration board, composed of representatives of the holders of the rights and of the broadcasting organisation and a president appointed by the Ministry of Corporations.

The non-material rights of performers are safeguarded by a provision of the 1928 Act which requires the broadcasting organisations to preserve the technical rules needed to obtain the best possible results in order to avoid any distortion of the interpretation that might prejudice the interests of the performer.

The Legislative Decree of 5 December 1938, which came into force on 7 February 1939, provides for a case not covered by the earlier Act but which has become frequent enough in recent years to call for clarifying legislation. This is the broadcasting by means of records of artistic performances given in public. The 1928 Act provided only for the direct, and therefore immediate, broadcasting of such performances. The Legislative Decree of 1938 now provides for cases where the performances are recorded by the broadcasting organisation with a view to a deferred broadcast.

The Decree empowers the Italian Broadcasting Institution to record on a disc, band or other similar device for broad-

casting purposes artistic performances given in public. The Institution may make two broadcasts of such records. For the first it must pay the holders of the rights under the 1928 Act the remuneration fixed by that Act for direct broadcasts, while for the second the remuneration is fixed at 20 per cent. of the amount paid for the first.

In return for the payment of this compensation the Institution has the right to broadcast the records made from all its stations, either simultaneously or by groups of stations successively, on condition that the subsequent broadcasts take place not later than ten days after the first. After use, the records must be destroyed or rendered unusable.

The Broadcasting Institution may be punished by a fine of 1,000 - 2,000 lire in case of contravention.

Compensation is not due to the holders of the rights in the case of special broadcasts for artistic or cultural propaganda for foreign countries undertaken at the order of the Ministry of Popular Education. The Ministry may also suspend the application of the order to destroy certain records.

Japan

The Copyright Act of 1899 as amended on several occasions, the most recent amending Act being that of 15 July 1935, now contains a provision to the effect that the adapter of a musical work to a device for the mechanical reproduction of music shall be deemed to be the author in respect of this device. It should be noted that this formula resembles that used in the German legislation; but the general terms in which it is couched are somewhat ambiguous, since both the performer and the manufacturer of the record may be regarded as " adapters ". In any case, the Act gives the person who can establish his claim to the title of " adapter " rights similar to authors' rights, including all the prerogatives generally granted to authors. The provision does not apply, on the other hand, to public auditions or broadcasts effected by means of devices for the mechanical reproduction of sound (in particular gramophone records); the consent of the author, and hence that of the performer, is not required for such auditions and broadcasts.

Latvia

Performers are covered by the Copyright Act of 10 May 1937, section 14 of which assimilates them, when recording

an interpretation by mechanical means, to the author whose creation they record. All the rights of the author — in respect of publication, reproduction, production in quantities, etc. — are accorded to the performer, along with the right to have his name mentioned.

The records may be played in public, however, without the authorisation or special remuneration of the performer.

Mexico

Two sections of the Civil Code of 1928 protect the rights of performers.

Section 1183 is as follows :

" The following persons shall have exclusive rights over the publication and reproduction of their original works, by whatever process, for a period of 30 years :

. . . . . .

VI. musicians, whether composers or performers. "

Section 1191 adds that :

" Without prejudice to the author's rights, performers or actors may acquire rights over the sound reproduction of literary or musical works. "

Mexican legislation thus establishes, beside the author's rights over his work, exclusive rights for the performer who interprets it.

Norway

LEGAL DECISION

Performers are not protected by any legislative provisions, though an attempt has been made to bring them under a section of the Act of 1930 concerning works produced by intellectual activity. Some account of this attempt may be given.

In connection with a dispute similar to many that have come before the courts in different parts of the world during recent years between gramophone-record manufacturing companies and broadcasting corporations, the Civil Court of Oslo gave a decision in March 1938 on one of the arguments put forward by the plaintiff company. The company claimed that the manufacturer of a record had rights derived from those assigned to performers by section 2 of the Act, which protects " translations and other adaptations ". The view of the Court was that the term " adaptations " did not cover performances.

"In the first place the plaintiff has demonstrated no legal basis for the protection of performers, and it is agreed, as a matter of theory, that our legislation does not grant them authors' i.e. performers') rights. . . . There are few reasons, if any, for supposing that the protection of manufacturers against broadcasting would benefit the large majority of performers, although it is this majority that most needs protection for economic reasons. Further, the act of interpreting a piece of music is in fact an artistic achievement — often of a high order — and yet it is not protected by our legislation."[1]

Poland

There are no legislative provisions devoted especially to the rights of performers, but the Copyright Act of 29 March 1926 contains passages upon which reliance could be placed, if occasion arose, to provide performers with a certain protection. Section 2 of the Act lays down that :

"Transformations of other persons' works, such as translations, adaptations, musical arrangements, cinematograph films, arrangements for instruments for the mechanical reproduction of music, etc., shall also give rise to authors' rights on condition that they are effected with the permission of the author of the original work (contingent author's rights).

"This authorisation shall not be required if the rights of the original author have expired ; it shall lapse if the transformation is not carried out within five years.

"The above-mentioned limitation shall not be applicable to a work which amounts to a personal creation, even if it has been inspired by the work of another."

It is true that section 10 of the Act lays down that in the case of arrangements of musical works for reproduction by mechanical devices, the author's rights pass to the recording undertaking or, when the work has been specially ordered, to the party giving the order ; but section 11 provides that these questions can be settled otherwise by contract, and thus leaves the way open for the protection of the performer. Moreover, the distinction made by the Act between independent and contingent (transformer's) rights introduces a notion which does not exclude the possibility of protecting performers.

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[1] *Inter-Auteurs*, No. 81, March-April, 1938, p. 650.

Legal Decisions

The notions of adaptation or arrangement for instruments for the mechanical reproduction of music to which section 2 of the Copyright Act gives expression are open to interpretation by the Courts. Thus a decision given on 16 December 1938 by the Warsaw District Court discussed the exact meaning of these terms and stated that they could apply only to an adaptation or arrangement involving a genuine transformation of the original work and could not refer to the mere fact of recording the said original work on a disc in as faithful a way as possible. The Court accordingly dismissed the claim of a number of gramophone record manufacturing companies which maintained that under the Act they could claim authors' rights in regard to such records. The companies have lodged an appeal, but it has been thought of interest to draw attention here to the interpretation given by the court of first instance[1].

Portugal

A Bill to amend existing copyright legislation proposes the extension of its protection to performers. It contains the following provisions :

" Section 4. The following types of reception for commercial performance of works broadcast without the author's permission shall be deemed to be sources of unearned gain and, as such, to give rise to the payment of compensation : (*a*) wireless reception and transmission for the purpose of attracting or entertaining the public or members of an association ; (*b*) broadcasting either by telephone or by a relaying station ; (*c*) recording on gramophone records or sound-film; (*d*) publication, by conversion into a book, libretto, article, story, etc. of a broadcast literary or artistic work ; (*e*) relaying, after reception, of a broadcast work.

" Exclusively for the purposes of this section, and without prejudice to the rights of the real authors of the works performed, the following shall be deemed to be authors : (*a*) symphony orchestras represented by their conductors engaged to give a concert not organised expressly for broadcasting ; (*b*) broadcasting stations or broadcasting companies organising a musical or literary and musical programme for an audience not of a commercial character ; (*c*) players of musical instruments, singers, actors, and other artists taking part in the performance or interpretation of broadcast works ; (*d*) manufacturers of records and similar objects.

" Section 9 (2). The work of musical or theatrical performers engaged and paid by the producer of a record on the occasion of

[1] *Copyright.* International Review for the Protection of Literary, Artistic and Industrial Property. Leyden (Netherlands). Vol. IV, No. 4, April-May 1939.

its recording shall be deemed to be a mere hiring of services, unless otherwise agreed . . .

"Section 34. The professional name of a musical or theatrical artist or performer shall be protected as an intellectual right provided that he is registered with the Conservatory for Intellectual Copyright or that he has been registered for the purpose of a professional licence with the General Theatrical Inspectorate."

Switzerland

The Copyright Act of 7 December 1922 protects recorded artistic performances, section 4 stipulating that :

"When a literary or musical work is recorded by the personal intervention of a performer on a contrivance which renders or performs it mechanically, this recording shall constitute an adaptation protected by the Act. The same shall apply to recording by punching, the fixing of pins and staples, stamping, or any similar process, in so far as the recordings can be considered artistic.

"The rights of the holder of the copyright in respect of the original work shall in all cases be reserved."

It will be seen that the Swiss Act is based on the same principle as the German, namely, that the performer is an adapter of the original work and should be protected as such in the same way as the author proper.

Various interpretations of the Act have been put forward. While some commentators have argued that section 4 establishes the rights of performers, others have contended that the section should be regarded rather as laying down the basis of the manufacturer's rights, the performer being mentioned solely with a view to defining the manner of making the record. An important decision given in July 1936 by the Federal Court, however, corrected false interpretations and determined the legal position.

Legal Decisions

In January 1936 the Court of Appeal of the Canton of Berne, in giving reasons for its decision in a case between a number of gramophone-record manufacturing companies and the Swiss Broadcasting Company, formulated an interpretation of section 4 of the 1922 Act, upon which the plaintiffs had based their claims in respect of their records. The Court considered that this section provided direct protection for the manufacturer of the record, as its adapter, irrespective of whether rights

had been transferred to him by the performer. It expressed, moreover, serious doubts as to the existence of performers' rights under the Act.

The Federal Court, called upon as the supreme judicial authority to pronounce on this decision, confirmed the conclusions of the Berne Court but expressed a contrary opinion on the interpretation of section 4 of the 1922 Act.

It emphasised that " the text and history of the Act were not contrary, as the lower court considers, to the recognition of the performer as the holder of author's rights ". After quoting the statements of the authors of the Act and analysing the provisions of the Berne Convention, the award of the Federal Court concludes : " Consequently, although the Berne Convention does not assign author's rights to the performer, for the reasons enunciated by the lower court, the Federal Act does grant him such rights. "

The Court then accepted the principle of the cession of the performers's rights to the manufacturer of the record, which it declared to be " in the nature of things if indispensable for the commercial use of the record ", and declared that in the case before it the performers had formally ceded their rights, including the rights of public performance and broadcasting. The companies to which the performers had, in this particular case, transferred all their rights were international undertakings with offices in France, Germany, Great Braitin, and Switzerland.

United States of America

Two Bills are at present before Congress which provide for certain amendments in the Copyright Law to secure for performers the same protection as that given to authors. The sections which it is proposed to introduce into the existing Act would, in a few brief clauses, include performances among the kinds of work protected and would thus assimilate performers to authors. A special clause would, however, specify that the rights granted to performers shall not curtail or infringe authors' rights in any way[1].

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[1] *The Revision of the Copyright Law.* Daly Bill H. R. 5275, and Guffey Bill S. 2240, Harvard Law Review, 1938, p. 915.

Legal Decisions

A case which came before a Philadelphia court[1] in 1935 aroused keen interest not only among performers, manufacturers of gramophone records, and wireless broadcasting organisations, but also among jurists interested in the rights of professional workers. F.W., a conductor, had instituted proceedings against the WDAS broadcasting station, which had used records of performances given by his orchestra. The plaintiff admitted that no Act protected performers, and that his work could not be included among those protected by the Copyright Law. But he considered that even under common law he held a right of ownership over a product — his interpretation — which was his own creation. In his view, the use of records of his work constituted an act of unfair competition, since a broadcasting undertaking paid $13,000 weekly for an hour's performance by this orchestra, while the WDAS station had obtained for 75 cents one of his records — the broadcasting of which, moreover, was forbidden by a reservation printed on its label.

The court admitted that the performer held a right of ownership in respect of his work, and pointed out that a number of earlier judgments had laid down that it was not necessary for an intellectual product to be an original creation in order to justify the producer's claim to ownership. It admitted also that the prohibition of broadcast printed on the record was justified, since " unless such a restriction can be imposed and enforced it will be impossible for distinguished musicians to commit their renditions to phonographic records — except possibly for a prohibitive financial compensation — without subjecting themselves to the disadvantages and losses which they would inevitably suffer from the use of the records for broadcasting ". Finally, the court upheld the contention that there had been unfair competition.

This judgment, which attracted a good deal of attention, was considered by many jurists to be based rather on considerations of equity than upon positive law. It revealed the necessity of defining performers' rights, and played a large part in creating the present movement for their protection.

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[1] Court of Common Pleas No. 1, for the County of Philadelphia, June Term, 1935, No. 9053.

Uruguay

The Act of 17 December 1937 concerning literary and artistic property contains the following four sections concerning performers :

" *Chapter VII : Performers.*

" Section 36.,— The interpreter of a literary or musical work shall be entitled to claim remuneration for the broadcasting or transmission of his interpretation by wireless telephony or television, or by printing or engraving on a record, film, band, wire, or other substance or object suitable for the reproduction of sounds or images. If the amount of the remuneration cannot be fixed by agreement, it shall be fixed by the competent judicial authority by means of summary procedure.

" Section 37. — The interpreter of a literary or musical work shall be entitled to prohibit the transmission of his interpretation if it has been reproduced in such a way as may prejudice his interests as an artist seriously and unjustly.

" Section 38. — In the case of performances by choirs and orchestras, the right to forbid transmission shall belong to the choir-master or conductor.

" Section 39. — Without prejudice to the author's property rights, any work performed in a theatre or public hall may be broadcast or transmitted by wireless telephony or television on the sole authorisation of the organiser of the performance."

It will be seen that these provisions resemble those of the Argentine Act of 26 September 1933 and establish, like them, a pecuniary right and a right of prohibition in the case of reproduction liable seriously to injure the interests of the performer.

§ 2. — Collective Agreements

Performers' organisations have tried to make up for the absence of legislation, or to complete inadequate legislative measures, by concluding collective agreements.

In the case of the gramophone industry, it was possible for such agreements to deal with either the conditions of work and methods of remuneration of performers employed by record manufacturers, or the general question of the rights of performers in respect of the mechanical reproduction of their work. Conditions of employment in the strict sense — hours of work, etc. — do not lie within the scope of this Report; they do not belong to the sphere generally referred to as that of performers' rights.

The question of remuneration is more closely connected with the subject of this Report, since, according to the nature and extent of the rights held by performers in respect of their work, they may claim, in addition to the payment received at the time of the recording, additional remuneration consisting, for instance, in a certain percentage of the receipts from sales of their records. Individual contracts, usually concluded with well-known performers, provide for remuneration of this kind, but neither this question nor that of the distribution of the remuneration paid in certain cases to record manufacturers for the right to broadcast their records seems as yet to have been made the subject of collective regulation.

No attempt has yet been made to solve by means of collective agreement the problem of the maintenance or the cession of the rights granted by certain legislative measures to performers in respect of the reproduction, distribution, and public playing of their records. As was mentioned on an earlier page, British performers complain that no clause of the 1925 Act deals with the question of the cession of rights. The absence of such a clause might jeopardise even the actual protection afforded by the Act, if it were to happen, for example, that performers were required to give a general consent to the recording of all their future performances. The British record manufacturers, for their part, state that they do not, and have no desire or intention to, acquire from any performer the right to record all his future performances. They add that the clause in the performers' contracts which has been in general use for a large number of years is designed solely to confirm the manufacturers' rights under the Copyright Act of 1911. The clause reads as follows :

" The Company shall be the owner of the original plate within the meaning of the Copyright Act 1911 and any extensions or modifications thereof, of each title recorded under the provisions of this agreement at the time when such plate shall be made. The company and/or its licensees shall be entitled to the sole right of production, reproduction, sale, use and performance (including broadcasting) throughout the world by any and every means whatsoever of the records of the works performed by the artists under this agreement. "

No collective agreement appears to have dealt with this question of the cession of rights with a view either to preventing the transfer of the whole or of part of these rights or to regulating the conditions and form of such transfer.

It is in the sphere of broadcasting that the largest number of attempts at collective regulation have been made. Some of these are already of long standing, and of those which have brought to the Office's attention several have already ceased to be effective. They will be indicated, nevertheless, by way of example, in order to show the various fields in which collective regulation has been attempted.

It must be mentioned, first of all, that, as in the case of the gramophone-record industry, the numerous and often very detailed contracts determining the conditions of employment and rate of remuneration of performers employed either intermittently or permanently in broadcasting studios have been left out of account. In several countries detailed collective provisions regulate the hours of work, including both rehearsals and the time spent before the microphone, as well as the remuneration of each category of performer — soloists, choirs, small and large orchestras, understudies, etc. All these questions fall outside the sphere of performers' rights.

The collective agreements concluded in the field of broadcasting refer to two distinct types of case : (1) the broadcasting of artistic performances given not for the broadcasting organisations but for an audience ; (2) the recording, by broadcasting organisations and for their own use, either of outside performances or of performances by artists in their employment. A very small number of measures refer to a third type of case, namely that of broadcasts by means of records in ordinary circulation.

As regards the first case — that of the broadcasting of performances intended for an audience — there were two possibilities of collective regulation : the agreement could be concluded either between the performers and their immediate employers (organisers of performances, concerts, etc.), or between the performers and the broadcasting organisations, despite the fact that the latter were only a third party to the performances and would normally deal directly only with the organisers. The second system appears to be the most usual. Yet it would seem normal that the additional remuneration paid to performers in the case of the broadcasting of the performance should be paid to them by their immediate employers, who generally receive compensation from the broadcasting organisations for permission to broadcast. This is what often happens in practice,

though on an individual basis and without collective regulation. One of the reasons why collective regulation has not been used more frequently in this type of case is that theatrical, etc. managers seldom belong to occupational associations capable of negotiating collectively on their behalf.

Nevertheless, mention should be made of an agreement concluded in *Germany* in April 1927 between theatre directors and actors, under the terms of which an artist taking part in a broadcast performance was entitled to compensation — fixed by a judgment of the Superior Arbitration Court at half his daily pay — in addition to his ordinary remuneration, provided that the total sum paid in compensation did not exceed half the fee paid by the broadcasting company — the other half being payable to the organiser of the performance. The Agreement made it compulsory for performers to take part in such broadcast performances.

In *Australia* a collective regulation, made binding throughout the State of Victoria by a decision of the Musicians' Wages Board given on 14 March 1939, provides that if the whole or part of any musical performance of employees engaged otherwise than exclusively for broadcasting is broadcast, each of the said employees shall be paid, in addition to his prescribed rate, 5s. for each such performance ; this additional amount is reduced by 10 per cent. in the case of theatrical performances, concerts, and religious performances.

Another case which should be mentioned is that of the contractual provisions at present in force in *France* between the performers' associations and the theatre undertakings. These provisions stipulate, for orchestra players and choruses, a supplementary allowance of 25 per cent. of wages, as well as a fixed allowance of 200 francs for each broadcast to be paid to the fund of the union to which the performer belongs. Actors must be given a flat-rate allowance of 500 francs for each performance if the organiser receives no compensation from the broadcasting station, and of 1,000 francs, if such compensation is paid. These allowances are paid not individually to the performers but to their union. Singers employed in theatrical performances receive compensation equal to 50 per cent. of their fees.

Lastly, mention may be made of a model collective agreement concluded in May 1938 in *Poland* between the Theatrical Performers' Association and the management of the " Polski Teatr " at Poznan, an agreement which appears to serve as a basis for the relations between the Association and the Polish theatres. It provides that for any performance which is broadcast by wireless the performers shall receive additional remuneration, fixed at 50 per cent. of the sum received by the management from the broadcasting organisation in the case of a play, and 40 per cent. of the said sum in the case of musical performance. The additional remuneration must be divided among the performers in proportion to their pay.

Among the agreements concluded between performers' associations and broadcasting organisations, reference may be made to one which was in force in 1929 between the *Belgian* Federation of Musicians and the Radio-Belgique Company, which provided for the payment of 1,000 francs monthly to the Federation, as well as supplementary compensation varying according to the size of the orchestra and the type of performance. Two other agreements at present in force in Belgium between performers' associations and two broadcasting stations of secondary importance provide for the payment of a certain sum to the relief fund of the performers' association in the case of the broadcasting of a performance. The National Symphony Orchestra receives regular compensation for its broadcast concerts.

In *Czecho-Slovakia*, under a collective agreement concluded with the sections of the Performers' Union, the broadcasting organisation pays soloists, choirs, and theatre orchestras special allowances for broadcast performances. The sums paid vary according to the importance of the theatre, and reach the figure of 2,000 crowns for each performance in the case of soloists at the National Theatre. In the case of groups such as orchestras and choirs the members share out the lump sum paid in compensation.

A number of agreements signed at different times in *France* by performers' associations provided for the payment of allowances of 20-25 per cent. of the salary of each performer in broadcast performances. During a few months of 1936 a

national agreement concluded between the State Broadcasting Service and the National Federation of Theatrical Employees provided for the payment to the Federation of 10,000 francs monthly as a contribution to the aggregate salaries of musicians whose work was broadcast by State stations. This agreement was suspended to give place to a more comprehensive arrangement, providing for the establishment of a performers' pension fund; negotiations concerning this arrangement are still in progress.

In *Poland* an agreement which was in force in 1930, concluded between the Actors' Union and the Polish Broadcasting Company, laid down very detailed regulations for the supplementary remuneration of performers for broadcast theatrical performances; these rules applied to all performers whose names were mentioned in the programme.

The Union of *Swiss* Musicians has proposed to the broadcasting companies, through unsuccessfully, a scheme providing for the payment of special allowances to performers and a contribution to the Central Unemployment Fund, to be fixed in proportion to the number of musicians whose work is broadcast.

The second type of case to which reference has been made is that of records made by broadcasting stations for their own use or that of affiliated institutions, generally for the purpose of enabling them to broadcast at a more suitable time or to repeat broadcasts of the performance. Sometimes these records are of a very temporary character; sometimes, however, they are effected in such a way as to make them permanent. This type of case is one which might be considered in connection with the problems of gramophone recording, but it is preferable to deal with it under the head of broadcasting in view of the exclusive use made of the records by broadcasting institutions. Frequently the records are made by performers attached to the studios; nevertheless, the problem does not fall within the field of conditions of employment in the ordinary sense but rather within that of performers' rights, for the question at issue is whether the hired services of the performer consist of single performances before the microphone or whether they include the permanent recording of these performances, permitting the subsequent replacement of the person of the performer.

A certain number of collective agreements have been concluded on this subject between performers' organisations and broadcasting institutions. In *Czecho-Slovakia* the agreement already mentioned between a broadcasting organisation and the various sections of the Performers' Union grants performers the right, in the case of the broadcasting of their recorded performances, to special compensation equal to 10 per cent. of the rates fixed for direct broadcasts.

In *France* an agreement concluded in December 1937 between the Musicians' Union of Paris and the Parisian Broadcasting Station provides that for every recording capable of replacing an orchestra each member of the orchestra whose work is recorded shall receive remuneration at the rate fixed for the type of record in question, and that a royalty of 10 per cent. of the cost of the recording shall be paid to the Musicians' Union by way of performers' dues each time the record is broadcast.

A standard contract at present being used by the *German* Broadcasting Institute permits broadcasting stations to record the performances of artists in their employment. The records made, however, must be used only by the broadcasting organisations and only for the purpose of tests, filing, etc., or for a broadcast which it has been necessary to postpone for technical reasons. When the records are broadcast in other circumstances, the performers are entitled, for each broadcast, to compensation equal to 10 per cent. of the recording fees.

In *Hungary*, the broadcasting studios may make records to be used for deferred broadcasts, but special remuneration is due when the records are so used.

The Actors' Association of *Norway* has concluded with the National Broadcasting Corporation a provisional agreement which stipulates that recordings effected by the Corporation may be broadcast, subject to the payment of compensation amounting to 50 per cent. of the sum paid for the recording. No new recording may be made save for the purpose of a single broadcast. If, in exceptional circumstances, it is desired to broadcast a recording more than once, the Corporation must on each occasion consult the representatives of the Association.

Also in Norway, a collective agreement was concluded on 15 December 1938 between the Musicians' Union and the Norwegian Broadcasting Corporation which deals with the case of deferred broadcasts to foreign countries. Under this

agreement the Corporation undertakes to pay a lump sum of 10,000 crowns a year to the Musicians' Union, for a relief fund. In return for this sum, it may make records of the performances of members of the Musicians' Union for the Corporation. These records are broadcast between 11 p.m. and 10 a.m. by short-wave transmission to foreign countries. Every month the Corporation submits to the Union a report on the recorded items that have been transmitted. Disputes are decided by an arbitration board set up under the agreement.

In *Sweden* the Swedish Musicians' Union recently prepared, in collaboration with the Swedish Broadcasting Corporation, a draft agreement regulating in detail the remuneration of performers whose work is recorded either independently or in connection with a broadcast, and the compensation due to them for the broadcasting of their records. In most cases no compensation is due for the first broadcast, but for the second and third the rates fixed are respectively 50 and 25 per cent. of that paid for the recording. The Corporation reserves the right to sell records made without paying further dues to the performers whose records are sold in the ordinary way.

On 12 July 1938 an agreement was concluded between the American Federation of Radio Artists and two large broadcasting companies of the *United States*. Under this agreement the companies undertook not to make electrical transcriptions or recordings of the performances of artists in their employ except for purposes of reference, filing, audition, or broadcasting from stations licensed only for experimental work. Nevertheless, when a station authorised to transmit a programme is prevented from doing so because of a conflicting broadcast, a failure of facilities, or because the station is a part-time station, it is entitled to broadcast a transcription or record once within seven days of the original broadcast.

There remains the case of the use of records in normal circulation for broadcasting purposes. Reference has already been made to the numerous actions brought by record manufacturers against broadcasting organisations in this connection, in which the plaintiffs' claims were based to a large extent upon the rights of the performers. In general, this problem has been ignored in collective agreements. But mention should be made of the negotiations at present going on between the

French National Federation of Theatrical Employees and the State Broadcasting Institution regarding the question of compensation, to be paid either to the Federation or to an association to be created, with a view to securing to performers whose records are broadcast a certain percentage, to be supplemented in certain cases by a collective payment.

CHAPTER III

RECORD OF THE MEETING OF THE COMMITTEE OF EXPERTS

As already stated, the Governing Body of the International Labour Office decided at its Seventy-eighth Session (February 1937) to set up a Committee of Experts on the rights of performers in broadcasting, television and the mechanical reproduction of sounds, the function of which was to make a preliminary study of the question in order to make it easier for the International Labour Conference to deal with it. The present chapter contains the record of the meeting of this Committee, as submitted to the Governing Body at its Eighty-sixth Session (February, 1939).

The composition of the Committee of Experts was fixed by the Governing Body at its Eighty-second Session (February 1938). The Committee met, in accordance with the decision of the Governing Body, on 28 and 29 November 1938 at the International Labour Office.

The Committee was composed as follows :

International Institutions:

Mr. WEISS, Legal Adviser, International Institute of Intellectual Co-operation;

Mr. VEJARANO, Secretariat of the League of Nations;

Mr. MENTHA, Director, Office of the International Union for the Protection of Literary and Artistic Works.

Interested organisations:

Prof. GERBRANDY, Amsterdam, International Broadcasting Union;

Mr. LECOCQ, General Secretary, International Organisation of Industrial Employers;

Mr. BRIAN BRAMALL, Secretary-Treasurer, International Federation of the Phonographic Industry;

Mr. Romain COOLUS, Honorary President, International Confederation of Societies of Authors and Composers.

For the performers' organisations :

Mr. GALLIÉ, General Secretary, International Confederation of Professional Workers;

Mr. CEBRON, General Secretary, French National Federation of Theatrical Employees.

Mr. Vejarano was accompanied by Mr. GIRAUD (Legal Section, League of Nations);

Mr. Gerbrandy was accompanied by Mr. JARDINE-BROWN (British Broadcasting Corporation, London) and Mr. DOVAZ, Assistant General Secretary of the International Broadcasting Union, Geneva ;

Mr. Coolus was accompanied by Mr. René JEANNE, General Secretary of the International Confederation of Societies of Authors and Composers.

The Chair was taken by Mr. Lecocq.

The experts took note of a documentary report prepared by the International Labour Office and adopted as a basis of discussion a list of thirteen questions given in the report which summarised the various problems at present arising out of the rights of performers. It was agreed at the beginning of the discussion that this decision did not imply that the report as a whole was accepted. The conclusions reached by the Committee on each of these questions are given below. It should be pointed out that the experts belonging to organisations of performers stated, before the discussions began, that they were particularly anxious that the rights of performers should not in any way, either in their principle or in their effects, interfere with authors' rights. The experts as a whole approved this attitude and consequently confined themselves strictly to the sphere of labour law and the contract of employment.

RIGHT OF AUTHORISATION

Points 1 and 2

This question was formulated as follows in the report of the Office :

" Should the performer have, independently of the right held by the author of the work, an exclusive right to authorise the recording and broadcasting of his work ? or

" Should the performer have only the right to forbid reproductions and broadcasts likely to injure his reputation ?

" (In this case should measures be envisaged to prevent recording by third parties not party to the contract of employment ?)"

In agreement with the experts belonging to organisations of performers, the Committee unanimously decided to delete from the text the notion of an *exclusive* right for performers. The following text was adopted unanimously :

" Without prejudice to the exclusive rights of authors, no record and no broadcast of an original performance may be made without the consent of the performer. This provision does not cover recording for the internal technical needs of the broadcasting institution."

This text was accepted by the expert of the International Broadcasting Union subject to the right recognised as belonging to broadcasting institutions with regard to recording with a view to a deferred broadcast (see point 7).

Mr. GALLIÉ and Mr. CEBRON (organisations of performers) and Mr. Romain COOLUS (International Confederation of Societies of Authors and Composers) proposed to add a clause stating that the consent of the performers should also be necessary for any subsequent public utilisation of the recordings of their original performances. This proposal did not however meet with the unanimous approval of the Committee. Another proposal by the same experts to the effect that " the performer should be entitled to object to reproductions which might injure his character or reputation " also failed to secure the unanimous agreement of the Committee.

NON-MATERIAL RIGHTS

Point 3

This question was phrased as follows in the report of the Office :

" Should the performer have the right to claim authorship of his interpretation and, in particular, to require that his name should be indicated on his records and announced on the occasion of broadcasts of his work ?"

The experts replied to this question in the affirmative, but thought it better to omit the notion of the claim of authorship. The Committee accordingly unanimously adopted the following text :

" *The performer is entitled to require that his name be indicated on records of his performances and when his performances are broadcast.*"

PECUNIARY RIGHTS

Point 4

This question was phrased as follows in the report of the Office :

" Should the performer be entitled to special remuneration in cases in which one of his interpretations which has already been paid for by an employer as a direct performance is broadcast ?"

The Committee unanimously adopted the following draft on this point :

" The performer is entitled to claim from his employer a separate remuneration, distinct from remuneration for the performance itself, if his performance is broadcast, even when his contract contains no provisions to that effect. "

Mr. GALLIÉ, Mr. CEBRON and Mr. Romain COOLUS also asked that the separate remuneration mentioned in this point should be proportionate to the number of relays which might be given of the original broadcast. Professor GERBRANDY (International Broadcasting Union) opposed this proposal on the ground that relays, which are often given within the same country, are in most cases technically necessary in order to reach districts which could not otherwise be directly served by the principal station even if its power were increased.

Point 5

The question as drafted in the report of the Office was as follows :

" Should the performer be entitled to remuneration for the broadcasting of his records ?"

The Committee was unable to reach unanimity on this point.

Mr. Brian BRAMALL (International Federation of the Phonographic Industry) maintained that the performer, at the time when he agrees by contract to have his performance recorded, is aware that the record will be used for broadcasting, and takes this factor into account in fixing his fee. The fee thus includes remuneration for any subsequent utilisation. Manufacturers of records, moreover, have not everywhere the right themselves to oppose the broadcasting of records. Until they have that right, performers cannot be protected by them. Mr. Bramall said, however, that he was in favour of the protection of performers against the clandestine manufacture and utilisation of records.

Mr. GERBRANDY held that the problem was complicated by the fact that legislation varies between the different countries. In some countries it gives manufacturers the right to object to the broadcasting of records, while in others it does not give them that right.

Mr. CEBRON pointed out that the fact that performers and manufacturers of records are uncertain whether or not the record can be broadcast prevents them from taking full account of this factor in deciding on the fee for the performance. He

drew attention to the importance of this question in view of the extremely precarious economic position of performers.

Mr. WEISS (International Institute of Intellectual Co-operation) said that the two problems of recording and the subsequent utilisation of the record in the form of a public performance were distinct and could not be dealt with simultaneously. The rights due at the time of recording could not replace the latter rights. The two questions should be kept apart in the case of performers, as the International Bureau at Berne and the Organisation for Intellectual Co-operation claimed that they should be in the case of authors.

Although the Committee was unable to reach unanimity on Point 5 it was agreed that the problem should not be excluded but should remain open for consideration at subsequent international discussions.

With regard to clandestine recordings the following text was adopted unanimously.

" The Committee of Experts considers it necessary to protect performers against clandestine recording (that is, recording without the performer's knowledge and consent) and against all use of such records. "

Point 6

The question in the report of the Office was as follows :

" Should the performer be entitled to compensation for public performances of his work given by means of loud-speakers used in connection either with wireless broadcast or with gramophones placed before the public ? "

The Committee considered that this question could not be settled apart from the previous question. It was agreed, as in the case of point 5, that it should remain open for consideration although the Committee had not been able to put forward a unanimous opinion on it.

Point 7

This question appeared in the following terms in the report of the Office :

" Should the performer be entitled to remuneration for the broadcasting of records of his work made by broadcasting institutions for their own use ? "

The Committee unanimously adopted the following text on this question :

" The broadcasting organisations are entitled to record artists' performances for broadcasting at a later date without making a payment

additional to that stipulated for the direct broadcast. On the other hand, if subsequent use is made of the record, special remuneration must be given for it.

METHODS OF APPLICATION

Point 8

This question was framed as follows in the report of the Office :

" Who should be the holders of the rights considered above ? Should they be determined in the case (*a*) of non-material rights, (*b*) of pecuniary rights, by naming the persons authorised to claim the rights or secure their enforcement in the name of groups of performers (orchestras, choirs) ? "

The Committee unanimously adopted the following drafting, which concerns both non-material and pecuniary rights :

" *Exercise of these rights shall be vested in the performers, or, in the case of group performances, in the persons empowered to this effect.* "

It was agreed that the term " persons " in this text should also include corporate persons.

Point 9

The report of the Office contained the following question on this point :

" Should the period of validity of the rights be fixed, and, in particular, should it be stated whether or not the rights may be transferred to the holder's heirs ? "

Mr. GALLIÉ, Mr. CEBRON and Mr. Romain COOLUS put forward a request for recognition of perpetual right to the mention of the name (non-material right) and for the exercise of pecuniary rights until ten years after the death of the performer.

Mr. GERBRANDY opposed any suggestion that the right of the performer should continue after his death, since this would be equivalent to conferring upon that right the quality of an absolute and exclusive right similar to authors' rights.

Mr. MENTHA (Office of the International Union for the Protection of Literary and Artistic Works) maintained, on the other hand, that a pecuniary right could exist for a definite period without this implying the recognition of an exclusive right.

After further discussion, the Committee unanimously adopted the following drafting concerning one of the aspects of non-material rights :

" The right to the mention of the performer's name should continue as long as the record of the performance lasts. "

By the " right to the mention of the performer's name ", the experts meant the performer's right to demand that his name should be mentioned on the records of his performances and at the time of broadcasting of his performances (see point 3).

The Committee was unable to reach unanimous agreement on the duration of pecuniary rights, as in the case of point 5, with which this question is closely connected. It was, however, agreed that the question should remain open for consideration at subsequent international discussions.

Point 10

This question appeared in the following form in the report of the Office :

" Should certain exceptions to the application of performers' rights be allowed (for performances in the public interest, school performances, etc.) ?"

The Committee adopted the following drafting :

" Certain exceptions to the application of the rights of performers should be allowed in the case of performances in the public interest. "

Point 11

The following question appeared in the report of the Office :

" Should the conditions governing the cession of all or part of performers' rights be fixed ?"

Mr. GALLIÉ and Mr. CEBRON pointed out that a performer could not cede all his rights for a lump sum at the time when he was negotiating the recording of his performance. He might become much more well known and it would not be fair if it were possible, in consideration of a lump sum, which had been fixed a long time ago and which might be small, to continue to reproduce without any compensation to the performer a performance the commercial value of which had changed. They proposed that contracts regulating the cession of rights should be subject to periodical revision, or that the cession of the rights should include a method of associating the performer

with the success of his work, e.g. by providing the payment of a certain percentage of the turnover to the performer.

Mr. BRAMALL maintained that the risks run by manufacturers in recording little-known performers necessitated their being contractually free to secure the services of a performer in respect of a particular recording by means of a flat or lump sum payment.

In the course of the discussion which followed it was stated that the problem of the cession of the rights was of great importance to all the parties involved and that the fact that the Committee had been unable to reach complete agreement should not cause it to be eliminated from the discussion. The question should remain open for consideration at future international discussions.

Mr. Bramall said that manufacturers had no desire whatever to acquire all the rights, whether present or future, of a performer over his performance. With a view to reassuring the performers on this point, he proposed the following text, which was unanimously adopted :

" The acquisition from an artist of the right to record all his future performances in consideration of a lump sum payment should be prohibited."

Point 12

The report of the Office contained the following question :

" Should provision be made for the establishment of institutions for the collection of fees due in connection with performers' pecuniary rights, similar to those operating in connection with authors' rights ?"

The Committee considered that the method of collecting fees in connection with performers' pecuniary rights should be left to the decision of the performers themselves, who were the only persons concerned.

Point 13

The report of the Office contained the following question :

" Should provision be made for an arbitration procedure to be used in case of disputes ?"

During the discussion the experts agreed in admitting the principle of arbitration, but preferred not to specify definitely how such arbitration should be instituted and what should be the details of its application. Different systems exist in

different countries, and it was not thought possible to propose rigid rules on this point. The following text was finally adopted unanimously :

" The Committee of Experts agrees that the question of the principle of arbitration should be raised subject to the reservation that the detailed methods of application should be left to national collective agreements, laws, or regulations."

A discussion also took place on the question whether broadcasting and television should be dealt with together or separately. Several members of the Committee pointed out that as regards certain aspects of these problems there might be advantages in dealing with them separately but that the various points on which the Committee had reached agreement could serve as a basis for international regulations applying also to performers in television.

CHAPTER IV

CONCLUSIONS AND COMMENTARY ON THE QUESTIONNAIRE

I. — DESIRABILITY OF INTERNATIONAL REGULATIONS AND THEIR FORM

1. The essentially international character of performers' rights, in respect both of the technical processes employed and of the interests at stake, has frequently been emphasised. Broadcasting knows no frontiers ; this applies with special significance to the performers, who are mainly concerned with the artistic part of the programmes. The gramophone industry also is largely international. The problems facing artistic performers in their relations with the new technical processes of broadcasting or the preservation of sounds are the same in every country. Consequently no serious argument has been formulated as yet against the principle of international regulations. On the contrary emphasis is laid everywhere upon the disadvantages of leaving the solution of a problem such as this entirely to national legislation.

The few hesitations which were shown, arising from the small number of legislative measures at present dealing with the subject, seem to have disappeared. Among the reasons which explain this practically unanimous acceptance of the idea of international regulations must be mentioned the fact that in the absence of legislative provisions or collective agreements — the only measures with which this Report could deal — the pressure of circumstances has given rise to customs and practices affecting several details of performers' rights which in course of time have become more and more generally accepted (for instance, the right to the mention of the performer's name, for which no provision is made at present by law or contract, has become a general practice) ; further, the fact that there is a tendency in a number of countries to issue regulations respecting this problem ; and above all the fact that the measures adopted or under contemplation are of a somewhat heterogeneous character. This last circumstance, due to the novelty of the pro-

blem and the variety of the legal conceptions taken as a basis for its solution, offers serious obstacles to the development of activities such as the gramophone industry and wireless broadcasting which, as has been stated, are quite definitely of an international character, and makes it desirable that guiding principles should be laid down so as to bring the national efforts in this direction into mutual harmony, as has been done in the case of authors' rights. In a memorandum addressed in 1930 to the International Labour Office, the General Secretary of the International Wireless Committee wrote :

"The necessity for drawing up an international Convention appears specially urgent since national legislation on the matter seems to show a divergent tendency.

"Past experience in the preparation of international Conventions shows that it becomes extremely difficult to arrive at a single text reconciling national opinions if opposite principles have already been sanctioned by law in various countries.

"If, on the other hand, an international Convention laying down general principles as regards actors' and performers' rights has been already adopted, it will make it easier to obtain uniformity in national legislation, which can simply follow the lines of the Convention."

This opinion reflects fairly accurately the present attitude of the persons and institutions concerned with the problem of performers' rights.

All the enquiries carried out by institutions making a special study of intellectual property and by the committees of experts convened by them have concluded in favour of the preparation of international regulations.

If the Recommendation adopted by the Rome Conference in 1928 for the revision of the Berne Convention referred the problem back to national legislation, this was because, for the reasons explained above, regulations within the scope of a Convention dealing with authors' rights had been shown to be impossible. The same fact explains the proposal contained in Article 11 *quater*, put forward with a view to the impending revision of the Berne Convention, for leaving the question to be decided by national law.

On the other hand the idea of an international Convention to be prepared by the International Labour Organisation, and therefore in abstraction from the question of authors' rights, got round these difficulties and received the assent of the parties concerned. Not only the authors but the broadcasting organisations and gramophone industry showed their preference

for such a system of regulation and were prepared to enter upon a preliminary discussion. Their representatives met on the Committee of Experts convened by the Governing Body of the International Labour Office in November 1938, and came to an agreement upon a list of points sufficiently numerous and important to constitute a basis for a Convention.

In view of the growing movement in favour of the recognition of performers' rights and the highly satisfactory results obtained by the Committee of Experts (on which the principal interests concerned were represented) the Office reached the conclusion that, after the enquiries and consultations that it had carried out, an international regulation of the question was both possible and desirable. It has also become clear, during the years devoted to studying the problem, that, in view of its character and of the situation of the parties concerned, an international labour Convention would be the most favourable method of solving it. Accordingly, with due regard for existing regulations and those still under contemplation, for past studies and for the agreements more recently concluded between the parties, the Office has drawn up the questionnaire reproduced below, with a view to eliciting replies that may make it possible to prepare a draft for an international labour Convention.

II. — SCOPE OF THE INTERNATIONAL REGULATIONS

2. The following three criteria will serve better than any enumeration of the classes of persons to be protected as a guide for delimiting the scope of international regulations.

The first is obviously the *use* that is made of any given performance. Only persons whose performance is used for broadcast by wireless telephony or television or for the purpose of recording would be protected by the regulations, and they would be protected with respect to that performance only.

This first criterion would not suffice to delimit the field of protection, since it would include a number of cases which cannot in equity give rise to a performer's right. A second criterion is necessary, namely the *subject* of the performance in question. The subject of the performance must be the interpretation of a literary or artistic work. Such a test would permit the elimination of persons who, although selected for the purpose of a broadcast or record, such as the members of a sports team

or persons interviewed, heard, or seen in the course of a news item, cannot lay claim to protection as performers.

Any doubts as to the exact meaning of the term " literary and artistic work " can be solved by referring to the definition given by the Berne Convention for the protection of literary and artistic works. This Convention lays down that literary and artistic works shall include all productions of a literary, scientific and artistic nature, whatever the method or form of expression, such as books, pamphlets and other writings; lectures, speeches, sermons and other works of the same character; dramatic or musical works, designs and arrangements for ballets and pantomimes, the production of which follows a script or otherwise; and finally, musical compositions with or without words. The Convention adds to this list drawings, paintings and architectural works, etc., which do not fall within the scope of artistic interpretation, since they belong to artistic or technical processes the production of which are communicated directly to the public and do not necessitate the medium of a performer, whose intervention would indeed be impossible.

Finally, a third criterion, that of the existence of an *employment relationship*, must be applied. On this basis, the contemplated regulations would cover two classes of situation :

(a) that of persons bound by a contract for the hiring of services to an impresario or the organiser of an entertainment, and

(*b*) that of performers whose employment relations are established directly with a broadcasting studio or a manufacturer of gramophone records.

In the first case the performers, not being in a position to discuss directly the conditions on which a broadcast or a mechanical reproduction of their performance may be made, would be covered by the regulations as a whole and would benefit in particular by certain protective measures having special reference to their situation, as, for example, the right to separate remuneration in addition to the remuneration received for a direct performance.

In the second case, in consequence of the absence of a middleman in the relations of the performers with the broadcasting organisations or the manufacturers of gramophone records, a certain number of protective measures under contemplation which presume the existence of such a middleman would not be applicable. The performers would, however, be covered

by the other clauses. Thus, in the case of a performer under contract with a firm engaged in mechanical reproduction for the making of gramophone records, the clause respecting the rights to mention of the performer's name and the right to have his performances properly reproduced, and the clause prohibiting the acquisition from a performer of the right to record all his future performances in consideration of a lump sum payment, should apply.

In the same manner performers engaged specially by broadcasting studios would be covered, for instance, by the clause concerning non-material rights and, as regards pecuniary rights, by the clause concerning the subsequent utilisation of records made with a view to the deferred broadcast of a performance.

On the other hand, this criterion of an employment relationship would exclude from the scope of the proposed regulations performers, whether professional or amateur, who are not bound by a contract of employment to an organiser of entertainments or an impresario or to any broadcasting organisation or manufacturer of gramophone records.

The Governments are requested to state whether, for the purpose of defining the scope of the international regulations, they would accept as satisfactory a definition based on these three criteria, namely, the use of a performance for wireless broadcasting, television or the mechanical reproduction of sound, the subject of such performance and the existence of a contract for the hiring of services binding upon the performer.

III. — THE RIGHT OF AUTHORISATION

3. The question of the exclusive and absolute right of the performer over his performance was for a long time the subject of somewhat acrimonious discussion. This was inevitable so long as the question was considered within the framework of the question of authors' rights. It was pointed out that it was quite inconceivable that there could exist two exclusive rights side by side over one and the same work presented to the public, the right of the author of the work and that of its interpreter. It was observed on the other hand that the subject of these rights was not the same, as one arose out of the creation of the work itself and the other out of the performance of the work in a certain manner and out of that performance only.

The fact remained that the defenders of the authors' rights perceived a threat to the recognition of the author's exclusive

rights in a legal theory tending to regard the performance of his work as a kind of creative activity, giving rise to property rights. Discussed on this ground, the problem was bound to give rise to the most serious difficulties. On the one hand it was apparent that the changes which had occurred in the possibilities of the economic exploitation of an artistic performance made it necessary to protect the performer, but on the other it was equally apparent that such protection could not result in the recognition of rights equivalent to those of the author.

The performers asked nothing better than to discover a ground upon which protection could be given them without their having to claim an exclusive right of property that would always be open to challenge. All that they wanted was to prevent the illicit use of their performances and to ensure that their performances should not, by means of modern technical processes, be passed on without their consent to a public considerably extended in time and space — a public, that is to say, quite other than that for which the performance was intended at the time when the conditions of the contract of employment were laid down. It has been shown how protective labour legislation offered a solid foundation for the solution of the problem, and how, by adopting it as a basis, the Committee of Experts which met in November 1938 evolved for the interpretation of what has been called the " right of authorisation " a formula which will be referred to later.

Although many of the legislative measures adopted or contemplated, such as the Italian law of 1928, the Argentine law of 1933 and the Uruguayan law of 1937, do not make the authorisation of the performer a condition for the broadcasting or mechanical reproduction of the performance, nevertheless many such measures do grant this right of authorisation. Such a right is established either by provisions which create a special performer's right (e.g., the Dramatic and Musical Performers' Protection Act, 1925, in Great Britain), or by placing the performers' rights on the same footing as authors' rights (e.g., the German law of 1910, the Austrian law of 1938, the Finnish law of 1927, the Hungarian law of 1921, the Latvian law of 1937, the Mexican law of 1928, the Swiss Act of 1922 and the Czecho-Slovak law of 1926). This was also the method adopted in the Bills introduced in the United States of America.

Thus, in one form or another, performers are already granted in a number of countries a legal right of authorisation

as regards the mechanical reproduction or broadcasting of their performances. Moreover, even in default of legislative provisions, such a right has to a large extent been established by custom. It is quite usual for individual contracts of performers engaged in theatres or for a concert season to include a provision concerning broadcasting. It is even customary in many places of entertainment to obtain the consent of the performers before making a wireless broadcast of their performance where no provision to this effect is made by law or contract.

The members of the Committee of Experts convened in November 1938 by the Governing Body of the International Labour Office clearly had in mind these legislative measures and the customs widely practised in this field when they agreed on a text which provided that " without prejudice to the exclusive rights of authors, no record and no broadcast of an original performance might be made without the consent of the performer ".

By using the currently received expression " exclusive rights of authors ", specifically used in the Berne Convention to designate the right of property enjoyed by the author, and by him alone, over his work, the experts desired to emphasise that the rights of the performers are quite distinct from the rights of the authors and should not encroach on them.

Further, by using the expression " original performance ", the experts intended to reserve the question of the broadcasting of records which is, as is well known, highly controversial and has been the subject during recent years of a large number of legal actions between the broadcasting organisations and the manufacturers of gramophone records, who in most instances base their case on the performers' rights. This problem is dealt with under 5 below.

It must be emphasised that the question now put by the Office, to which the experts have replied in the affirmative, refers exclusively to the recording or broadcasting of an original performance. This constitutes a typical case of an artistic performance originally meant for a certain public, and which it is subsequently proposed to transmit to a different public — if different in terms of time, by recording, and if different in terms of space, by broadcasting. The experts were of opinion that any extension of this nature, for which no provision was made at the time when the conditions of the performance were fixed by agreement between the parties, and which, consequently, entailed

a subsequent and profound modification of the purpose of the performance, should not take place without the consent of the performer. Such a rule — the experts were careful to explain — would not apply to the now current technical practice of recording for a deferred broadcast by the broadcasting institution concerned. (This last case, with respect to which the experts came to an agreement and drafted a proposal, constitutes a special point in the questionnaire — see questions 12 and 13.)

Governments are invited to state whether they consider that the international regulations should contain a clause prescribing that, without prejudice to the exclusive rights of the author, the broadcasting or recording of an original performance should not be carried out except with the consent of the performer, it being understood that this rule would not apply to recordings made by broadcasting studios for a deferred broadcast, where the consent of the performer to a broadcast has already been obtained.

4. The question whether the obligation to procure the consent of the performer should be extended beyond the simultaneous broadcasting of the original performance, and whether such consent ought also to be required for the subsequent transmission of a record to a fresh public, gives rise to much more discussion than that of the direct and immediate transmission of a performance.

The members of the Committee of Experts found no difficulty in coming to an agreement on one point, namely the utilisation of clandestine recordings. They adopted a text which was accepted by the representatives of the performers and the authors as satisfying the minimum requirements in this connection. The representative of the gramophone industry proposed, that is to say, that performers should be protected against the utilisation of clandestine recordings of their performances, i.e., those made without the knowledge and consent of the performer. This solution, which was in accordance with the provisions of the Dramatic and Musical Performers' Protection Act, 1925, in Great Britain is, of course, based on the presumption that the performers have — as is also laid down in the British Act — been granted a right of authorisation in respect of the original recording of their performances (a right which the Committee thought should be granted to them, as has been seen, and which is the subject of question 3 above).

Such a provision would give performers a remedy not only

against clandestine recording but also against the subsequent utilisation of any such record. This would follow logically from the obligation to obtain the consent of the performer for the recording of his performance; for it would seem absurd to prohibit the making of a record without proper authorisation and yet to permit the public utilisation of a record made in contravention of this rule.

Governments are requested to state whether they are in favour of a clause, unanimously recommended by the members of the Committee of Experts representing the various parties concerned, prohibiting the public utilisation of clandestine recordings (that is, those made without the knowledge and consent of the performer).

5. In the case of the broadcasting of recordings, could such a principle be extended so as to constitute a more general right of authorisation, covering not only the case of clandestine recordings but also the utilisation of all recordings ?

The performers are warmly in favour of such an extension. They point out that, in view of the severe competition to which they are subjected by the broadcasting of records, performers are entitled to a right of supervision. If such a right were admitted, it is obvious that the obligation to procure the performers' consent could not be made compulsory for every individual broadcast, and that an arrangement similar to that established for authors should be made. The main object in granting a right of authorisation would be to establish a system of royalties.

The wireless broadcasting organisations, whose programmes include a large number of records, are, generally speaking, opposed to giving the performers a right of any kind as regards this manner of using records.

It has been mentioned above that the question of the right of authorisation of performers with respect to the broadcasting of the recordings of their performances had been raised indirectly in the course of a number of lawsuits between the manufacturers of gramophone records and the broadcasting organisations. As the manufacturers based their case in these lawsuits on the rights which they alleged to have been assigned to them by the performers, the courts were called upon to decide whether the law did in fact admit that the performers possessed these rights. In this connection mention has been made of the judgment of the Supreme Court of Appeal in Germany (November

1936), which laid down the law on this subject: the Supreme Court acknowledged that the Act of 1910 protected the performer not only against the unauthorised recording of his performances but also against the unauthorised broadcasting of such recordings, though it declared that the right of authorisation must be considered to have been transferred by tacit agreement to the manufacturer of gramophone records. In January, 1936, the Swiss Federal Court delivered a similar judgment, to the effect that manufacturers of gramophone records possessed a right of authorisation obtained from the performers. In the United States of America a decision, which excited wide comment and to which reference has been made above, was delivered in 1935 giving the performer this same right of authorisation in respect of recordings of his performances.

Thus in certain countries performers are considered to have a right of authorisation in respect of the broadcasting of records of their own performances.

On the other hand, the legislative provisions in certain other countries specifically exclude the broadcasting of recordings from the scope of the right of authorisation granted to performers. Thus, the Austrian law of 1936, which gave extensive rights to performers over the broadcasting and recording of their original performances, gave them no rights with respect to the subsequent broadcasting of records. The same applies to Hungary, where in a decision issued in May 1935, the Royal Curia defined the meaning of the law of 1921. In Japan neither the author nor the performer has any rights over broadcasting effected by means of mechanical musical instruments. Lastly, in Latvia, where the law of 1937 grants the performer similar rights to those possessed by the author, the right of authorisation is inoperative in the case of the broadcasting of records.

In November 1938 the Committee of Experts was unable to arrive at an agreement on this question. Both points of view found supporters. A proposal by the representatives of authors and performers, to the effect that the consent of the performers, which was admitted to be necessary for direct broadcasting and recordings, should also be required in the case of any subsequent public utilisation of the records, failed to obtain the unanimous approval of the Committee.

Thus the situation, as regards both the legislative measures in force and the attitude of the parties concerned, still reflects

a division of opinion. The broadcasting organisations claim complete freedom from restraint in a matter which appears to them essential for their normal operations. They base their claim on the legal argument that the granting of a right of this kind to the performer would be equivalent to giving him an exclusive right of ownership over the records, similar to that possessed by the author. Although they claim no such right, the performers insist that they should have a voice in respect of a matter which closely concerns their economic situation, since, as has been shown, the competition to which they are subjected on account of the use of gramophone records for broadcasting is calculated to restrict their openings for employment. The main importance, from their point of view, of the right of authorisation which they claim is that it would enable them to obtain some compensation for this competition, in the form of royalties.

Governments are invited to state whether they consider that a right of authorisation should be granted to performers in the international regulations for the broadcasting of the records made of their performances. It is obvious that, as in the case of the making of the records, this right would not apply to the utilisation by broadcasting studios of records made with a view to a deferred broadcast.

IV. — NON-MATERIAL RIGHTS

Those intellectual rights which it is customary to term " non-material rights " may not appear, at first sight, to be at all closely connected with the sphere of protective labour legislation. Such rights, it might be argued, are inherent in the personality of the individual, and the object pursued in securing their recognition is to protect something essentially different from his material interests.

In the case of a performer, the issue under discussion is his artistic reputation — an important factor in the potential value of his professional services to any employer who may hire those services. What is at stake is not any ideal principle of respect for the artistic creation and personality of the performer, but the protection to be given to a part of his property, namely, his reputation, which constitutes a positive element in the assessment of his professional ability and consequently of the remuneration to be paid for his work.

It is in the essential interest of the performer, not merely from the point of view of his self-esteem as an artist but from the point of view of his value in the labour market, that his performances should not be anonymous, and also that the value of his performances should not be lowered in the eyes of the public, and consequently in the eyes of a possible employer, by defective recording or by unsatisfactory methods of broadcasting. This explains why, when the International Labour Office's Advisory Committee on Professional Workers undertook in 1933 to lay down the two or three fundamental principles which should constitute performers' rights, it felt bound, after an exhaustive consultation of the organisations of employers and intellectual workers, to include non-material rights among the points which it considered essential.

Two aspects of performers' non-material rights require special emphasis, namely, identification of the performance (right of the performer to have his name mentioned), and respect for the form of the performance (right to have the form and quality of the performance respected). This latter point is dealt with under point 7 of the questionnaire. As regards point 6 (below), the question at issue is the former aspect of non-material rights, viz., the identification of the performance, or right of the performer to have his name mentioned.

Right of the Performer to have his Name mentioned

6. When a work is broadcast, the first requirement which must be satisfied is the announcement, before the microphone, of the name of the author. There is, however, a further requirement, equally justified, namely, the mention of the name of the interpreter of the work in question. The same applies to the recording of a work. Any given work may be the subject of a number of recorded interpretations. In addition to the need for enabling the public to distinguish between these various recordings — the only effective way of doing which is to indicate the name of the performer — it is only just that the work of the performer should not be attributed to another person and that it should not be offered to the public anonymously. The performer's right to have his name mentioned is an essential condition to the achievement of celebrity which, as has already been pointed out, is an important element in the assessment of the value of his professional services. The mention of the performer's name is indispensable in order that the quality of his work

should be known and appreciated by the public; and the degree to which the quality of his performances is recognised plays an important part when the rate of his remuneration comes to be fixed. The right of the performer to have his name mentioned thus does fall within the sphere of protective labour legislation.

It is evident that, in the case of a joint performance (by an orchestra, choir, etc.), all the performers cannot claim to have their names mentioned. Careful consideration was given to this matter, which formed the subject of specific proposals, and a special item (No. 14) was set aside in the questionnaire to deal with it. The solution of this problem would not appear to offer any real difficulty.

After discussing the question of non-material rights the Committee of Experts at its meeting in November 1938 unanimously accepted the principle of the mention of the name of the performer when broadcasting a performance or making a record of a performance, thus recognising what is, in practice, a regular custom; for gramophone records placed on the market usually bear the name of the individual performer, or of the orchestra or choir which performed the work, in addition to the name of the author or composer. The same practice is normal in broadcasting a performance or a record. The insertion in an international convention of a clause concerning the right of a performer to have his name mentioned would thus merely confirm a rule currently accepted in practice.

Governments are invited to state whether in their opinion the international regulations should lay down that a performer is entitled to require his name to be mentioned on any record made of his performance and whenever his performance is broadcast.

Right to have the Form and Quality of the Performance respected

7. The purpose of the second point included under the heading of non-material rights is to ensure respect for the form given by the performer to his performance, or, in other terms, to maintain the integrity of the performance by protecting it against any addition, cut, alteration or distortion. It is important to add that the performers do not claim a right to a general and unconditional respect, which, if granted, might lead to the lodging of endless complaints bearing on unimportant details of reproduction, but merely a right limited to cases where the

alterations or distortions are calculated to harm their professional reputation.

The reasons advanced in support of their claim are similar to those put forward in the case of the right of the performer to have his name mentioned. Here again, considered as a subject for protective labour legislation, the question which concerns performers most, as in the preceding case, is that of the value at which their professional services are to be assessed. This value depends upon the appreciation of the public which, although no doubt based primarily upon a direct hearing of the artist, is in these days also largely founded upon the impression created by his records or broadcastings. The reputation of a performer is at once liable to suffer if the *timbre* of his voice, his articulation, or the shades of expression are seriously distorted by a defect in broadcasting or recording technique.

Doubtless the danger is more serious in the case of a gramophone record, any defect in which is lasting, than in the case of a broadcast, which is ephemeral. The danger, however, recurs when a gramophone record is broadcast, since the record may be spoiled or worn and therefore likely to give an unfavourable impression of the performance. Admittedly, it is in the interests of broadcasting organisations to possess gramophone records of good quality only. Furthermore, when concluding agreements with wireless broadcasting organisations, the manufacturers sometimes reserve the right to hold a periodical inspection of the collection of gramophone records in broadcasting studios in order to obviate the use of worn or spoiled records which would harm their reputation. It is therefore true to say that precautions are already taken in order to prevent defective transmission; and this fact should make it easier to grant the performer a right to have the form and quality of his performances respected.

Those countries where legislative measures for the protection of performers have been enacted which do not make provision for obtaining the consent of the persons concerned for the reproduction or transmission of their performances have nevertheless deemed it advisable to give them at least the means of defending themselves against defective technical processes. Thus, in Argentina, the Act of 1933 provides that a performer may forbid the distribution of his performance to the public "if it has been recorded in such a way as to involve a risk of injuring his professional interests seriously and unjustly". In

Italy, where the consent of performers is not necessary for the broadcasting of their performances, the Act of 1928 requires the broadcasting organisations to employ only the best possible technical methods, in order to avoid any distortion calculated to prejudice the interests of the performer. In Uruguay, as in Argentina, the law of 1937 gives the performer the right to prohibit the transmission of his performance to the public if it has been recorded in a manner calculated to prejudice his interests as an artist seriously and unjustly.

The Advisory Committee on Professional Workers of the International Labour Office adopted this point of view in 1933 when it drew up the list of fundamental principles for the preparation of international regulations. It recommended that performers should have " the right to object to performances or reproductions which might be prejudicial to them ".

On the other hand, the Committee of Experts convened in November 1938 by the Governing Body of the International Labour Office refused to accept as it stood an identical proposal submitted to it on behalf of the performers' representatives. The Committee had already, it is true, unanimously approved the principle that the previous consent of the artist should be obtained before making a record or broadcast; and it may be conceded that this important right comprises most of the other rights, and makes it unnecessary to formulate them explicitly. In the case under discussion, a performer whose prior consent is required can obviously take all necessary precautions to prevent defective broadcasting and recordings before giving it. If, on the other hand, the principle of prior consent is not admitted, the performer is powerless to prevent reproductions calculated to damage his reputation. The only remedy in this case is to give him the right to lodge an objection in cases where his professional reputation is threatened, as is done by the legislative provisions mentioned above.

Nevertheless, the question still arises whether the right to lodge an objection against a defective reproduction would be rendered completely superfluous by the adoption of the principle of prior consent. Cases may arise where a performer, having given his consent to the making of a record or to a broadcast subsequently perceives or is warned that the record or broadcast constitutes a serious reflection on his professional capacity. It is therefore quite conceivable that, after admitting the right of authorisation, it might be deemed necessary to give

the performer further protection by providing him with the possibility of objecting to a reproduction of his performance which proves to be seriously prejudicial to his artistic and professional interests, even after he has given prior consent.

To summarise, the right to have the form and quality of a performance respected needs chiefly to be granted in cases where the performer is denied the right of authorisation (as a study of various national legislations shows), but it may also be defended even where the latter right has been conferred upon him.

The obligation to respect the form and quality of a performance may assume two different aspects in the case under discussion. It may relate to the integrity of the performance, and so lay down the principle that the performance should not be subject to any cut or alteration calculated to distort it; or it may relate to the technical process of recording or broadcasting, which, even in the absence of any fundamental alteration of the performance, might (where the tone of the apparatus used is seriously defective, for example), give an unfavourable impression of the performer's capacity.

Governments are therefore invited to state whether they are in favour of the insertion in the international regulations of a clause providing that the performer should have the right to object to a broadcast or recording of his performance calculated to injure his professional reputation, either by distorting, mutilating, or otherwise changing his performance, or on account of technical defects in the broadcast or recording.

V. — PECUNIARY RIGHTS

Broadcasting or Recording of a Performance given in Public

8. Of all the rights which it is proposed to confer on performers, that most generally approved is the right to pecuniary compensation for any utilisation of a direct performance[1] for broadcasting or making records. It does indeed seem only fair that an additional remuneration should be granted in cases where the utilisation made of any given artistic performance is more extensive as regards time and space than was originally

[1] By " direct performance " is meant the performance of a work in the immediate presence of an audience which hears or sees the said performance without the aid of any broadcasting or recording process.

intended, and where the original performance was, by agreement between the parties, taken as the basis for a specific remuneration, without any special stipulation providing for broadcasting or reproduction by gramophone record. This specific remuneration applies to a particular object, namely, a public performance; the installation of a microphone for the purpose of broadcasting, or of a recording apparatus, constitutes a fresh utilisation of the work of the artist and alters the entire basis of his employment and the factors to be taken into account in calculating his pay. Such a considerable extension of the normal conditions of a performance justifies the payment of special compensation to the performer. This was the opinion expressed by the Advisory Committee on Professional Workers of the International Labour Office, as a result of the extensive consultation of the organisations concerned carried out in 1933. The Committee declared that " every use made of the work of another confers upon the person or persons who carried out such work the right to receive a fair remuneration ". The Committee considered that this right to remuneration, together with the right to have the form and quality of performances respected, contained the elementary basis of performers' rights.

It should be noted that, as amongst the legislative measures adopted in various countries respecting performers' rights, those which fail to grant performers the right of authorisation do at least grant them pecuniary rights in the event of the reproduction of their performances. In default of any obligation to obtain their consent, care has at least been taken to ensure them special remuneration. Thus the Act passed in 1937 in Argentina provides, as has already been mentioned, that a performer interpreting a literary or musical work shall be entitled to remuneration for the broadcasting or televising of his performance, or for its recording in any manner whatsoever. In Italy, where broadcasting organisations have the right to transmit performances given in places of entertainment, without the necessity of obtaining the consent of the performer, the 1928 Act, which gives them this right, none the less obliges them to pay him fair compensation. The Portuguese Bill also lays down the principle of compensation. In Uruguay the law of 1937 also gives performers the right to claim remuneration for the broadcasting or recording of their performances. The other laws to which reference has been made (Germany, 1910; Austria. 1936; Czecho-Slovakia, 1926;

Finland, 1927; Great Britain, 1925; Hungary, 1921; Japan, 1935; Latvia, 1937; Mexico, 1928; Poland, 1926; Switzerland, 1922) do not include any clause making provision for pecuniary rights. This is because all these laws more or less explicitly admit the right of authorisation. Indeed, once the principle of prior consent is admitted, it may be considered that the specific granting of a pecuniary right which is automatically entailed by this principle is superfluous. A performer whose consent must be compulsorily obtained may make his consent subject to such pecuniary conditions as he may think fair. It can therefore be said that directly or indirectly all laws for the protection of performers give them the right to obtain special remuneration for the broadcasting or recording of their performances : indirectly, by conferring on the performer the right of authorisation, or, if this right is withheld, directly, by granting him instead a formal pecuniary right.

The Committee of Experts approved both these principles in November 1938. While recommending the application of the principle of prior consent on every occasion when an original performance is broadcast or recorded, it also took care to lay down the principle of a pecuniary right, when it declared that " the performer is entitled to claim from his employer a separate remuneration, distinct from remuneration for the performance itself, if his performance is broadcast, even when his contract contains no provisions to that effect. " The case which the Committee had in mind, namely that of broadcasting, is the ordinary one, occurring daily throughout the world. Nevertheless, it should not be forgotten that a direct performance may be used for the making of a gramophone record. It is clear that in this event also, as in that of a broadcasting, the performer is entitled to special remuneration, it being clearly understood, as the Committee of Experts took pains to specify, that the broadcasting organisations would retain the right to record a performance with a view to a deferred broadcast without being obliged to pay any sum over and above that fixed for immediate broadcasting. In other words, the recording of a direct performance would entitle the performers to special remuneration, but a record made by a broadcasting organisation of a performance for the broadcasting of which payment has already been made would not convey the right to separate remuneration, provided the record was definitely made not for sale to the public but solely for use in a deferred broadcast.

Even in countries where performers' pecuniary rights are not based directly or indirectly on legislation, it has to a large extent become customary to grant them. As has been seen, it has been recognised in collective contracts; and it is even recognised in the absence of a contract. As a rule broadcasting organisations pay, as is well known, remuneration for any entertainment broadcast by them. Such remuneration is sometimes paid partly to the entertainment undertaking and partly to the performers. More often payment of a lump sum is made to the head of the undertaking concerned, and he is then responsible for coming to an agreement with the performers concerning the distribution of the sum in question. It sometimes happens that the head of an undertaking who has been obliged to spend considerable sums in organising the entertainment, especially if he engages highly-paid artists, concludes an agreement whereby the performers renounce in his favour their right to remuneration for the broadcasting of the performance. The question of pecuniary rights is now frequently the subject of individual arrangement in entertainment undertakings, either with a view to regulating the waiving of their rights to remuneration by the artists or with a view to fixing the rate of their remuneration.

In the question put to Governments with regard to pecuniary rights, it has not been thought necessary to enter into details as regards the various ways in which the principle may be applied. Once the principle of separate remuneration has been admitted there is no need to insert rules for the payment of the remuneration in an international agreement. Payment may be made directly to the performers by third parties authorised to make use of their work — that is to say, generally speaking, the broadcasting organisation; or it may be made through the head of the entertainment undertaking; or again, it may be made, not individually to specified performers but, by agreement with them, to occupational provident institutions, as is sometimes required by collective contracts. The methods of payment would be determined nationally or frequently even locally. The Office has therefore restricted itself to raising the question of the principle of pecuniary compensation, which principle, it must be repeated, may be considered as arising out of the right of authorisation, but which may also be laid down independently, and may indeed remain as a sort of minimum programme, should the performer be denied the right of authorisation.

Broadcast Relays

9. The performers have raised the question of the number of relays that may be made of an original broadcast. They would like to see this point taken into account for the assessment of broadcasting fees. They consider that the wider the audience to which their performances are broadcast, the greater should be their special fees for the broadcast. A certain rate of remuneration, they claim, corresponds to a certain normal coverage of the broadcast — i.e., the normal number of listeners tuning in to a particular station. If other stations relay the original broadcast to a wider audience, then the remuneration should be increased proportionately. The broadcasting organisations are opposed to this claim on technical grounds. They point out that the purpose of relays is not always to extend the distance to which the broadcasts of a particular station can normally reach, but that they are often organised inside a single country in order to reach districts which could not otherwise be directly served by the principal station, even if its power were increased.

The representatives of the performers and authors laid a formal proposal before the meeting of the Committee of Experts convened in November 1938 by the Governing Body of the Office, to the effect that the question of relays should be taken into account. In view, however, of the technical objections put forward by the representatives of the broadcasting organisations the Committee was unable to come to a unanimous decision.

This problem is not dealt with by any statutory provisions and it is difficult to form an idea of the length to which regulations on the subject might be carried. Nevertheless, the Office has decided to put the question to Governments, since the performers' claims cover other cases than those in respect of which the above-mentioned technical objections have been raised — for instance, the case of an original broadcast of average power relayed by a powerful station extending far beyond the radius of the primary broadcast. But the Office is well aware of the difficulties of any solution which would take into account, not only the number of relays, but the relative power of the stations and the area covered by their broadcastings.

Public Utilisation of Recordings

10. Performers consider themselves entitled to claim a fee for the broadcast of recordings of their performances. Of

all the forms of competition to which the new technical processes of broadcasting and the reproduction of sound subject a performer, the wireless broadcasting of gramophone records is one of the most formidable. It is obvious that the direct broadcasting of an entertainment to a very wide public, which consequently is relieved of the effort of going to the concert or theatre, may seriously prejudice the interests of the performers; but at least such a form of broadcasting demands the actual presence of the artists, and, for that particular performance, at least, has not deprived them of the opportunity of employment. The broadcasting of gramophone records is on a different plane since it entirely replaces the artist whilst it provides the public with entertainment similar to that which it would have received from the direct performance of the work in question.

In the eyes of the performers this suffices to justify their claim to the payment of a fee, however small, on every occasion when a broadcast transmission of their performance of a work is given to the public without their presence being necessary. In support of their claim they point to the considerable economies realised by the broadcasting organisations, which provide their listeners at small expense with the equivalent of concerts which would have involved considerable outlay had they been obliged to engage the artists themselves. It has already been shown that the economy in question for a single broadcast, without taking into account the subsequent use of the same record for further broadcasts, is in the neighbourhood of 95 per cent.

Performers are well aware that the broadcasting of records is at present absolutely necessary for the work of the broadcasting organisations; they do not demand that any obstacles be placed in the way of this practice, but merely desire that they should receive some slight compensation in return. They call attention to the fact that of the three parties indispensable for the making of a record, namely, the author of the work, the performer and the manufacturer of the record, the performer, whose economic interests are as intimately affected as those of the other two parties, is the only one not to receive pecuniary remuneration. The author's royalties are paid regularly and the manufacturers in many countries also receive payment for such broadcasts. In most cases, as has been seen, the latter have established their claim to such payment indirectly, as assignees of the rights which are conferred by statute on the performers. The performer considers that his part in the making of a record,

which is by no means negligible, entitles him to compensation when the use made of the record competes seriously with his professional activities.

It cannot be denied, as the manufacturers of gramophone records and the broadcasting organisations do not fail to point out, that the performer has already been paid for the recording of his performance, and that at the time of fixing the payment in question he knew that the record might be used for public hearings and, in particular, for broadcasting. He was therefore in a position to take this factor into account when fixing the amount of his remuneration.

To this the performers reply that it is impossible when making a record to foresee precisely to what extent the record will be used for public transmissions, and that it is impossible to take this factor fully into account in the calculation of the remuneration.

All these arguments were subjected to fresh examination by the Committee of Experts in November 1938; but, in view of the divergent opinions expressed during the discussions, it was unable to reach a unanimous conclusion. It was, however, agreed that the question should not be allowed to drop but that it would have to be considered in the course of the future international discussions. The Office has therefore included a question on the subject (No. 10 of the questionnaire).

From the point of view of national legislation, the situation of performers as regards the broadcasting of records is hardly favourable. To be more precise, it might be considered fairly satisfactory in certain countries if the matter were judged solely in the light of an examination of the rights explicitly conferred on performers by the statutory provisions or deduced therefrom by the decisions of the courts. But, although these rights have been admitted by the courts, they have, at the same time, been considered to have been assigned by tacit agreement to the manufacturers of gramophone records. Thus in Germany, as has already been pointed out, the Federal Supreme Court of Appeal recognised that, under the Act of 1910, performers had rights in respect of broadcast records, but held that the manufacturer of the records became the holder of this right as from the time of the making of the record. In Switzerland the Federal Court has given a similar decision. It can at least be said that in these countries performers possess definite rights in respect of such broadcasts, even if the first holders of the rights

are no longer in a position to enforce their claims owing to the assignment deemed to have taken place.

In a number of other countries the protection granted by law to performers specifically omits the broadcasting of records. Thus, the Austrian law of 1936, which gave performers rights in respect of direct broadcasting, withheld such rights in respect of the broadcasting of records. The position is similar in Hungary, where the courts have held that the protection conferred by the law of 1921 does not cover the broadcasting of records. In Japan, as has been seen, authors and *a fortiori* performers have no rights in respect of such broadcasts. In Latvia, where performers have the same rights as authors, an exception is made, nevertheless, to the detriment of the former as regards the broadcasting of records.

In spite of their unfavourable situation in many countries, performers are still hoping for the laying down of regulations which will enable them, in the case of broadcasts from records, to obtain a fee which, while not so large as to weigh heavily upon the budgets of the broadcasting organisations, would compensate them for the loss of opportunity to earn brought about by the utilisation of gramophone records in broadcasting. Such a solution would, they consider, correct the possible arbitrariness of fixing a fee for recording at a stage when the extent to which the resultant record will be utilised for broadcasting is still unknown.

Governments are requested to state whether they are in favour of giving performers pecuniary rights in respect of broadcasts from records of their performances, even if the right of authorisation referred to in question 5 is not granted to them.

11. The case of public auditions must not be confused with broadcasting. It is true that the courts have in some cases held that broadcasting is a form of public audition. Generally speaking, however, a clear distinction is drawn between the " communication of a work to the public by means of broadcasting " to use the terms employed in the Berne Convention — a communication, that is to say, addressed for the most part to individual listeners — and the audition of a broadcast or a record by an audience gathered together in one place.

The claims of performers with respect to this kind of public audition are based again upon economic grounds. By using a broadcast or a gramophone record, the organisers of such auditions offer entertainment at small cost to themselves to

a public attracted as a rule for commercial purposes without having recourse to the services of the performers concerned. In spite of the analogy which exists from the point of view of the situation of the performers between the case of public auditions and that of the broadcasting of records, it is certain that in the former case a right granted to performers would entail supervision of the audition and a checking of the performances transmitted which would inevitably encounter difficulties. Nevertheless, such difficulties do not prevent the authors from receiving royalties to which they are entitled under the Berne Convention.

The Committee of Experts which was convened in November 1938 by the International Labour Office held that the problem of public auditions could not be solved independently of the question of the broadcasting of records. In view of the impossibility of coming to a unanimous agreement on this latter point, the experts abstained from formulating any proposal respecting public auditions.

The statutory situation in the various countries with respect to this problem is on the whole the same as in the case of broadcasting from records. However, although the German Act of 1910, which, according to the decisions of the courts, confers a right upon performers in respect of broadcasting from records, explicitly withholds any right as regards public auditions, the German Bill of 1932 adopts a contrary position in this connection; for it grants performers rights in respect of public auditions of their performances by means of wireless loudspeakers or sound recording devices, whereas it denies them all rights in respect of broadcasts from records.

Apart from this Bill the legal situation of performers is no more favourable as regards public auditions than in the case of broadcasting from records. Nevertheless performers are keenly anxious that their claims on this point also should be heard.

As the Committee of Experts, although unable to come to a unanimous agreement on this subject in November 1938, did not eliminate the question but on the contrary agreed that it should be brought up in the course of the future international discussions, the Office has felt justified in devoting a point in the questionnaire to it.

Governments are accordingly requested to state whether they are in favour of granting performers pecuniary rights in

respect of public auditions by means of loudspeakers relaying wireless broadcasts or gramophone records.

Recording for Deferred Broadcasting

12 and 13. Broadcasting studios are more and more using the procedure of recording an original performance for a deferred broadcast. The system has certain advantages. It is used either for the broadcast of public performances or of performances given in the studio. Broadcasting studios are sometimes faced with two performances of equal interest, given at the same time. If they wish to broadcast both, they must record one while the other is being broadcast. In the studio, too, it may happen that a performance can only be given at a time when the microphone is already occupied by another broadcast. Here again the possibility of recording is of value. Lastly, whether outside or in the studio, the only time at which some artists can perform is not the most convenient for the wireless public to listen. In all these cases recording is a usual procedure which makes it easier to organise programmes and cannot be prejudicial to the performers; indeed, it is to their advantage, for, in the case of studio performances, it enables them to record in otherwise unoccupied time and to devote the more valuable hours of the day to more productive performances. But the advantage to the performer depends on one condition : namely, that the records are used only for a deferred broadcast, in which case they are equivalent to direct broadcasting. They must be used only for the internal purposes of the studio, must not be reproduced and distributed to the public and must not be given a number of times before the microphone. It is clear that, in this last case, the remuneration fixed for the original performance in the studio or the special fee paid for the broadcasting of a public performance is no longer sufficient; it was intended to pay for a single and not for repeated broadcasts.

All these points are admitted, both by performers and by broadcasting organisations. Performers are in no way opposed to recording for deferred broadcasts; they recognise that, as it is merely a substitute for a direct broadcast, no remuneration is necessary other than that paid for a direct broadcast. All that they ask is that this substitute character should be preserved and that the broadcast should not be repeated more than once unless further payment is made to them.

With a single exception, national legislation contains no provisions concerning broadcasts subsequent to the performance. In countries where the right of authorisation is recognised, it is true that the performer has full opportunity, when his permission is requested, to agree with the other parties on the conditions for this kind of broadcast. It should be added that deferred broadcasts have only recently assumed their present admittedly great proportions. The development has been so considerable that, in Italy, as has been mentioned above, it has been thought necessary to add to the legislation of 1928 a new Act upon the subject. This step was required because the 1928 Act, which deals only with broadcasting, entitles broadcasting organisations to transmit public performances without having obtained the permission of the performers, provided that the latter are paid a special fee. It afterwards became necessary to provide for the case of deferred broadcasts, which had become frequent, and this was done by the 1938 Act, which lays down two as the number of broadcast performances that may be given by special records, which must then be destroyed ; it also fixes the scale of fees to be paid for these two performances.

The question of deferred broadcasts has been the subject of a number of collective agreements. Examples have been quoted from Czecho-Slovakia, France, Germany, Hungary, Norway, Sweden and the United States. In every case the agreement allows broadcasting organisations to record performances for deferred broadcasts. Rates of payment are laid down for a first or subsequent broadcast and precautions are taken to ensure that the records are reserved for the exclusive use of the studio and that their use does not extend beyond a certain length of time or beyond a certain number of broadcasts.

The Committee of Experts, in November 1938, quickly reached agreement on this question which, it should be repeated, is not a matter of dispute between the parties concerned. As is shown by the record of proceedings, quoted above, it unanimously adopted a draft providing that broadcasting organisations should be entitled to make records for deferred broadcasts without any payment in addition to that provided for direct broadcasting, on condition that special remuneration be paid if any further use be made of the record.

The drafting adopted by the Committee would preserve, for records made by broadcasting organisations, the character which it is generally desired that they should have. Broad-

casting organisations consider them a useful device which has become indispensable in the organisation of programmes; gramophone record manufacturers regard them as a part of the internal technical organisation of broadcasting transmission that should not compete with commercial records; performers look upon them as a substitute for direct broadcasting that should only replace a direct personal performance within strictly defined limits. The Committee of Experts' draft would satisfy broadcasting organisations by leaving them full freedom to make use of the device which they at present consider necessary, without their having to make additional payment for the records made. It would also satisfy record manufacturers by limiting the use of the records to the internal requirements of the studio. Lastly, it would satisfy performers by granting them, for any repeated use of the records, a special indemnity, which they regard as indispensable, since the initial payment is for a direct and single broadcast of their performance.

VI. — EXERCISE OF RIGHTS IN THE CASE OF COLLECTIVE PERFORMANCES

14. In the exercise of performers' acknowledged rights some difficulty arises in the case of collective performances. It would be impossible, for instance, to grant to each member of an orchestra or choir the opportunity to exercise individually all his possible rights. Thus, the right of the performer to have his name mentioned or the right to have the form and quality of his performance respected (non-material rights) could not, in practice, be claimed by all the members of a musical group. It would be impossible to announce at the microphone or to note upon the record the names of all the performers in such a group. It would be equally impossible to allow each individual performer the right to object to a broadcast or record in which his part in the orchestra might not be reproduced as it would have deserved if rendered separately. A musical or dramatic group forms a unit which cannot, in practice, be broken up into its elements, so far as the rights in question are concerned. The exercise of these rights, as regards both their possible surrender and the rate of remuneration, method of protecting non-material rights, etc., requires discussions and arrangements which cannot be undertaken with every member of the group. With soloists, of course, who can be detached from the musical

unit mentioned above, the exercise of rights is possible individually. For the other members, it was necessary to find some means of protecting their rights compatible with the normal work of the group of performers in question and with its employment for broadcasting and recording.

The Argentine Act of 1933, as has been stated, grants the performer the non-material right to object to any reproduction of his performance which might seriously prejudice his reputation. Account also had to be taken of collective performances and the Act finds a solution by laying down that, if the performance is given by a choir or orchestra, the right of objection is vested in the head of the choir or orchestra. The Austrian Act of 1936 vests the right of authorisation, in the case of a collective performance, " in the person directing it and the persons standing out in virtue of their character of soloist ". In Italy, the Act of 1928 lays down that the percentages to be paid to performers as indemnities for broadcasting are to be fixed in agreement with the broadcasting organisation by the impresario, or the managing company, acting in the name of the performers concerned. The Portuguese Bill mentions, among the persons entitled to performers' rights, " the symphony orchestra, represented by its conductor ". The Czecho-Slovak Act of 1926, in the case of choral or orchestral performances, selects the person directing the performance (conductor). Lastly, the Uruguayan Act of 1937, like the Argentine Act, grants the right of objection to the conductor of the choir or orchestra.

When called upon to examine this question, the Committee of Experts convened by the Governing Body of the International Labour Office in November 1938 unanimously adopted a draft under which the exercise of the various rights in question should be vested in the performers or, in the case of collective performances, in the person empowered to this effect; it was agreed that the term " person " should also include corporate persons.

The formula drafted by the Committee has the advantage of being somewhat elastic. It does not define who are the persons empowered for the purpose. It may be the conductor of the orchestra or the chairman of a musical association (some of these groups of performers have conductors paid by the association) or a corporate person such as a society, occupational organisation, etc. All that is essential is that there should be a person empowered to discuss with the other parties the manner in which the rights are to be protected and whose

acceptance can be deemed valid and representative of that of each member of the group.

Governments are asked to state whether they consider that such a formula would solve the question of collective performances, or to make any other proposal on the subject.

VII. — DURATION OF RIGHTS

The question of acknowledging certain performers' rights also raises the question of the duration of those rights.

This question arises out of the application of the new technique of gramophone recording, which has conferred upon performances — naturally ephemeral — a durable character, and has thus entirely changed the conditions upon which they were previously based. The recording of a performance turns it into a sort of durable object, in respect of which the question of durable rights necessarily arises.

A gramophone record — and the successive editions which may be made of it — lasts for a fairly long time ; it may even survive the performer whose performance it preserves. If the performer's rights have been acknowledged in respect of a record, it is necessary to lay down for how long, in the lifetime of the performer and perhaps after his death (since the record will still exist), these rights are to remain valid. In every case, therefore, where there is recording resulting from the mechanical reproduction of sound, whether the rights relate to the form to be given to the record or to its use for broadcasting, the question of duration will arise.

The question assumes a slightly different form according as non-material rights, or pecuniary rights and the right of authorisation, are in question.

Non-Material Rights

15 and 16. For non-material rights, the question of duration arises both for gramophone records and for broadcasting, in so far as the broadcast is from records. It will be remembered that the two kinds of non-material rights claimed for performers are the right of the performer to have his name mentioned and his right to have the form and quality of his performance respected. The manufacture of numerous copies of the record from the original matrix, the new reproductions and the successive editions through which the record may pass, often extend over a fairly long period. Throughout this time the question may arise

of either maintaining or dropping one or other of the above-mentioned rights.

In broadcasting, too, non-material rights may continue over a certain period. The right to mention of the name and the right to respect of performance may be claimed permanently in respect of broadcasting when records are employed. Even if the gramophone industry has strictly observed these two rights and consequently the name of the performer is indicated on the record and there is nothing in the technical registration prejudicial to the performer's reputation, both rights may be infringed when the record is broadcast. The name of the performer may not be announced or technical shortcomings in the broadcast may distort the recorded performance so seriously as to damage the performer's professional interests.

The best criterion to apply for the definition of these non-material rights, both in gramophone recording and broadcasting, would appear to be the life of the record. The rights which may attach to a given record naturally cannot outlive the life of that record, and necessarily disappear with it. It does not seem equitable that they should disappear earlier. There is no apparent justification for the suppression, from a given moment, of the mention of the performer's name on the records reproducing his performance, nor is there any apparent reason why it should be permissible, from a given date, to cut or alter in any way the recorded performance. The life of the record itself therefore seems to be the fairest and most convenient standard for deciding the duration of non-material rights.

This was the opinion of the Committee of Experts in November 1938. It considered the question of duration of rights and unanimously adopted a draft stating that the right to mention of the performer's name (that is, the performer's right to demand that his name should be mentioned on the records and at the time of the broadcasting of his performances) should continue as long as the record of the performance lasts.

It will be noted that of the two non-material rights considered by the experts, the right to mention of the name and the right of respect for performance, only the duration of the former was the subject of the Committee's recommendation. This was because the experts, as has been stated above in the paragraph dealing with non-material rights (questions 6 and 7), had not reached any unanimous conclusion concerning the actual grant of the right of respect for performance.

In any case, whatever may be the Governments' opinion on the extent of the non-material rights to be granted to performers (right to mention of name only or right to mention of name and right of respect for performance), the formula adopted by the Committee of Experts, under which the acknowledged rights would last as long as the record lasted, seems the simplest and fairest.

Governments are requested to state whether they consider this formula satisfactory, first as regards the right to mention of name and, secondly, as regards the right of respect for performance.

Duration of Pecuniary Rights and of the Right of Authorisation

17. The pecuniary rights under examination are of two kinds : one kind, those concerning special remuneration to a performer for the broadcast of his performance, or for a recording already paid for as a direct performance, cannot have any duration. The special remuneration would be payable only once for a given performance ; when that performance has been given and the broadcast or recording carried out, the right to remuneration cannot recur and immediately lapses.

On the other hand, the other pecuniary rights, which would ensure to performers an indemnity for the public use of their records (particularly by broadcasting), may possess duration, for they operate afresh in connection with the same record every time that it is used.

In fixing the duration of these pecuniary rights, should the same criterion be applied as for non-material rights, namely, the life of the record ? Would not this involve the danger of prolonging, over a considerable period, the obligation to pay the fees due upon the record ? It would seem that, for these rights, it would be necessary to fix a limited duration which should not be that of the too indefinitely extensible life of the record. The same is true of the right of authorisation which is, admittedly, a very general right making it possible to ensure, in practice, the observance of all the other rights, but one which would, above all, ensure the observance of pecuniary rights and so may usefully be considered as bound up with pecuniary rights and governed by the same rules on duration as they are.

There are three possible solutions to the duration of these rights. They could be given a certain duration, calculated

from the date of the performance, and that duration could be fixed, for example, at 30 years, as in the Mexican Act; or the duration of the rights could be that of the performer's life; or it could extend over the life of the performer, plus a given number of years after his death.

At the meeting of the Committee of Experts in November 1938, the representatives of performers and authors proposed, in accordance with the third of these solutions, that for pecuniary rights the duration should be up to ten years after the death of the performer making the record. This proposal was not, however, supported by the Committee as a whole because it had not been able to come to a unanimous decision on the primary question of the grant of pecuniary rights for the public use of records.

Governments are requested, if they have answered in favour of granting the right of authorisation and of pecuniary rights for the use of records, to state which solution they prefer in deciding the duration to be given to these rights.

Duration of Rights in the Case of Collective Performances

18. There remains the case of collective performances. The draft for an international Convention prepared by the International Union of Artistes (see Appendix V.) provides that the duration of the rights appertaining in common to performers who have performed the same work together should be reckoned on the basis of the date of decease of the last survivor of the group. This proposal, which was no doubt inspired by the solution adopted for authors' rights (it will be remembered that the Berne Convention provides that the duration of authors' rights in the case of collaboration is to be reckoned on the basis of the date of the death of the last survivor of the collaborators) would seem at first sight to lead in the case of performers to a number of practical difficulties.

While it is easy to obtain information on the survival of author-collaborators, who are generally few, this is not true of groups of performers, who are often numerous and who may after their collaboration live at great distances from one another. But, in fact, the persons empowered to collect the rights arising from these collective performances would have to keep in touch with the members of the group concerned in order to distribute

the amounts collected. It would not therefore be impossible to discover the date of death of the last survivor of the members.

If, however, this method of calculation seems to offer too many difficulties, it will be possible to fix for records of collective performances a specific time limit to date from the manufacture of the record.

Governments are asked to state which in their opinion would be the best solution to adopt in fixing the duration of the right of authorisation and of the possible pecuniary rights in the case of collective performances, namely, calculation of the duration of the rights on the basis of the date of decease of the last survivor of the group in question (the rights to cease either at that date or at the expiration of a certain number of years thereafter), or the grant of the rights for a specific period as from the date of recording.

VIII. — ASSIGNMENT OF RIGHTS

19 and 20. The problem of the assignment of rights is regarded as highly important by all parties concerned in the process of mechanical reproduction.

The Committee of Experts convened in November 1938 by the Governing Body of the I.L.O. unanimously adopted, on the proposal of the representative of the gramophone industry, a resolution dealing with one aspect of the assignment of rights. In this resolution the Experts recommended that the acquisition for a lump sum of all future performances of an artist should be prohibited.

A provision of this kind, which has received the unanimous approval of the parties concerned and would confirm a rule that is very generally observed in practice at present, might, it seems, without difficulty form part of the international regulations.

Governments are therefore asked to say, first of all, whether they accept this principle.

But there is also the question whether the international regulations should not also contain provisions governing the assignment of rights relating to a given performance.

Performers would like it to be impossible to acquire a performer's rights for a lump sum at the time of the recording of his performance. They maintain that the extent of a performer's celebrity may change with time and that it would be unfair

merely on the ground of the past payment of this lump sum to continue to reproduce without any return to the performer a performance whose commercial value has altered.

The record manufacturers emphasise the risks that they run when they record performances without any certainty as to the future success of the record, and urge that they should be left entirely free to decide by contract the conditions of an assignment of rights which they consider necessary to cover them against these risks.

It has been shown in the summary of national legal decisions that, as a rule, the courts consider such rights as the law may grant to performers, for example in respect of the broadcasting of their records, to have been assigned, if only by tacit consent, to the record manufacturers. Such assignment they consider to be natural if it can be shown to be essential for the commercial handling of the record.

Although the performers' representatives on the Committee of Experts in November 1938 did not overlook the requirements involved in marketing records, they proposed that the assignment of rights in respect of a given performance should not be final and irrevocable. They therefore asked that some system should be adopted which would give the performer an interest in the commercial success of his performance, either by a periodical revision of contracts, which would make it possible to adapt the conditions laid down in the contracts to the new situation created by the possible success of the recorded performance, or by requiring the payment to the performer of a percentage on the sales resulting from the commercial handling of his rendering.

The representative of the gramophone industry urged that manufacturers should be left free to secure the services of a performer for a given record by the payment either of a lump sum or of a percentage. Record manufacturers, although they apply in certain cases a percentage system for the remuneration of the performers whose performances they record, prefer to retain full freedom of contract in the matter, and wish the assignment of rights for a lump sum to be prohibited only in the case, referred to above, of a performer's future production.

The representatives of the performers and authors, who consider this latter prohibition as only a minimum solution of the problem of assignment of rights, would like to see far more extensive provisions adopted on the subject.

Governments are therefore asked to state whether they

are in favour of inserting in the international regulations a clause laying down the principles for the assignment of rights, and whether these principles should include a system allowing the performer to be given an interest in the commercial success of his performance.

If they consider the mention of such a system desirable, they are asked to state whether the system should involve the principle of the periodical revision of contracts or the requirement of payment of a percentage on the sales resulting from the commercial handling of the performance, or whether any other system seems to them more desirable.

IX. — ARBITRATION IN CASE OF DISPUTES

21. When the Sub-Committee appointed by the Advisory Committee on Professional Workers of the International Labour Office to consider the question of performers' rights, drew up in 1933, after extensive consultation of the organisations concerned, the points which in its opinion should form the basis of the regulation of these rights, it included the principle of arbitration conducted by joint boards set up by the Governments.

Although the Committee of Experts convened by the Governing Body in November 1938 did not reject the principle of arbitration, it considered that the fullest latitude should be allowed in the application of the principle. Several experts urged that the methods employed in this connection in the various countries were widely different and that careful attention should specially be given to the preference shown in some countries for the system of collective agreements, freely discussed and concluded. It did not, therefore, seem possible to make it binding on the public authorities to set up compulsory arbitration bodies.

The experts eventually adopted unanimously, with a view to the consultation of the Governments, a resolution in which they stated that they would agree that the question of the principle of arbitration should be raised, provided that the methods of application were left to be settled by the collective agreements, laws or regulations of the different countries.

When the Governing Body of the International Labour Office in February 1939 examined the results of the Committee of Experts' work, several of its members, workers' as well as employers' representatives, urged that the creation and working

of any possible arbitration bodies should be left entirely free from regulation.

In the performers' view, the arbitration system offers certain advantages, owing to the expeditious nature of the procedure and the competence of the arbitrators. The persons composing arbitration bodies are, in fact, generally chosen by agreement between the organisations concerned and are therefore specially well qualified to appreciate the professional cases which come before them. In view of the interest which the performers take in this system, the Office has included the question, in accordance with the resolution of the Committee of Experts, in the questionnaire addressed to the Governments.

Governments are therefore asked to state whether they consider that the international regulations should lay down the principle that disputes which may arise over performers' rights should be settled by arbitration, on the understanding that the methods of the application of the arbitration system should be decided in each country by laws or regulations or by collective agreements.

By the insertion in the international regulations of a clause laying down the principle of arbitration, States ratifying the Convention would undertake to apply, by methods which would not be imposed on them but which they would be free to choose, the principle of arbitration for the settlement of disputes arising out of performers' rights. Although they would be entirely free to settle details of application, the obligation of principle would remain and would involve serious consequences. Thus, in countries in which conditions of employment are largely governed by freely concluded collective agreements, the law would have to require the parties concluding such agreements to provide for the settlement of disputes by the creation of a system of arbitration.

X. — EXCEPTIONS TO THE APPLICATION OF PERFORMERS' RIGHTS

22 and 23. It may happen in some circumstances that the acknowledged rights of performers might be considered to hamper renderings of performances which it would nevertheless be in the public interest to facilitate. In these special cases it would be desirable to contemplate exceptions to the application of performers' rights.

These possible exceptions should not affect performers' acknowledged rights as a whole. There would be no difficulty in preserving in all circumstances the non-material rights — the right to mention of name and right to respect of performance. These rights should be maintained for two reasons. The first is that no circumstance should be allowed to distort, cut or alter a given individual's performance or to deprive him of his ownership in it; the second is that the observance of these rights cannot in any way hamper an audition of public interest and there would therefore be no need to authorise the infringement of them.

Only pecuniary rights and the right of authorisation, if any, could strictly be considered as capable of hampering these performances and therefore as suitable subjects for certain exceptions.

The Committee of Experts at its meeting in November 1938 admitted the principle of exceptions for auditions of public interest.

If the principle of exceptions were adopted, as well as the idea of public interest as a justification of those exceptions, in order to avoid difficulties of opinion arising from the variety of possible interpretations it might perhaps be desirable to state in the international regulations what is to be understood by " audition of public interest ". It would be useful, for example, to decide whether the term should or should not cover scholastic auditions, entertainments for charitable purposes, etc.

National ideas on the subject may, however, be too various for it to be possible to indicate at the outset in the international regulations cases which should be considered to be of public interest. In that hypothesis it would suffice if the regulations left it to the competent authorities in each country to decide the cases in question.

Governments are therefore asked first to state whether in their opinion the international regulations should lay down the principle of certain exceptions to the application of performers' pecuniary rights and right of authorisation in the case of auditions of public interest.

They are also asked to state whether the term " public interest " should be defined in the international regulations (and in that case, what definitions it would be desirable to give) or whether the definition of the cases classified as auditions of public interest should be left to the competent national authorities.

CONSULTATION OF GOVERNMENTS

The following questionnaire, by means of which the International Labour Office is consulting Governments, has been prepared on the basis of the information contained in the present study and of the results of the proceedings of the Committee of Experts at the meeting which was called by the Governing Body in November 1938 and at which were represented the various parties interested in the problem of performers' rights. A study of the conclusions of the present report will explain the reasons underlying the drafting of the various questions in the questionnaire.

It should be emphasised that Article 6, paragraph 16 of the Standing Orders of the Conference now contains a provision inviting Governments to " give reasons for their replies ".

Experience has shown that the brief replies, consisting often of a mere affirmative or negative, given by many Governments, rendered the preparation of texts for submission to the Conference a very difficult task. The grounds on which Governments based their affirmative or negative attitude remained in many cases unknown, and a factor which would have been valuable to the Office in drafting its texts and to delegates with a view to forming an opinion on them was consequently lacking.

Governments are therefore requested to take account of this provision and to indicate, in brief at least, the reasons for their replies.

QUESTIONNAIRE

I. — DESIRABILITY OF INTERNATIONAL REGULATIONS, AND THEIR FORM

1. Do you consider it desirable that the International Labour Conference should adopt, in the form of a Draft Convention, international regulations on the rights of performers in broadcasting, television and the mechanical reproduction of sound ?

II. — SCOPE OF THE INTERNATIONAL REGULATIONS

2. Do you consider that for the purposes of the proposed international regulations the term "performers" should include all persons who, under a contract for the hire of services, interpret a literary or artistic work, the interpretation being recorded by gramophone, broadcast, or televised?

III. — THE RIGHT OF AUTHORISATION

3. Do you consider that the recording of an original performance and the broadcasting of an original performance should be permitted only with the consent of the performer, the exclusive rights of authors being reserved and it being understood that this rule should not apply to recordings made by broadcasting studios with a view to a deferred broadcast, where the consent of the performer to a broadcast has already been obtained ?

4. Do you consider that the public utilisation of clandestine recordings (that is, those made without the knowledge and consent of the performer) should be prohibited?

5. Do you consider that the consent of the performers should be required for the utilisation of records of their performances for broadcasting purposes, it being understood that this rule should not apply to the utilisation by broadcasting studios of recordings made with a view to a deferred broadcast?

IV. — NON-MATERIAL RIGHTS

Right of the Performer to have his Name mentioned

6. Do you consider that the performer should have the right to require his name to be mentioned on a recording of his performance and when his performance is broadcast?

Right to have the Form and Quality of Performances respected

7. Do you consider that the performer should have the right to object to a broadcast or recording of his performance which would be likely to injure his professional reputation

(*a*) by distorting, mutilating or otherwise changing his performance, and

(*b*) because of technical defects in the broadcast or recording?

V. — PECUNIARY RIGHTS

Broadcasting or Recording of a Performance given in Public

8. Do you consider that the performer should have the right to receive, in addition to his fee for his direct performance, a separate fee when the performance is broadcast or recorded, even if the right of authorisation referred to in question 3 is not granted him?

Broadcast Relays

9. Do you consider that the separate fee referred to in question 8 should be proportionate to the number and importance of the relays, if any, of the original broadcast?

Public utilisation of Recordings

10. Do you consider that the performer should have the right to claim remuneration for the broadcast of a recording of his performance even if the right of authorisation referred to in question 5 is not granted him?

11. Do you consider that the performer should have the right to claim remuneration for a public audition of his performance given by means of loudspeakers in connection either with wireless broadcasts or with gramophones placed before the public?

Recordings with a View to Deferred Broadcasts

12. Do you consider that broadcasting companies should have the right to record performances with a view to a deferred broadcast without having to pay any fee in addition to that prescribed for the direct broadcast of the performance?

13. Do you consider that special remuneration should be paid if such a recording is used more than once?

VI. — EXERCISE OF RIGHTS IN THE CASE OF COLLECTIVE PERFORMANCES

14. Do you consider that in the case of collective performances the rights granted to performers should be exercised by persons empowered to this effect?

VII. — DURATION OF RIGHTS

Duration of Non-Material Rights

15. Do you consider that the right of the performer to have his name mentioned on the record of his performance should continue so long as the record exists?

16. Do you consider that the right of the performer to have the form and quality of his performance respected should continue so long as the record exists?

Duration of Pecuniary Rights and of the Right of Authorisation

17. Do you consider that the pecuniary rights and the right of authorisation of performers with respect to the public utilisation (for broadcasting or for a public audition) of their recordings should continue

(*a*) for a specified number of years as from the date of recording?

If so, what period do you propose?

or (*b*) for the lifetime of the performer?

or (*c*) until the expiration of a period consisting of a specified number of years as from the date of death of the performer?

If so, what period do you propose?

Duration of Rights in the Case of a Collective Performance

18. Do you consider that in the case of a collective performance the pecuniary rights and the right of authorisation of the performers should continue

(*a*) for a specified number of years as from the date of the recording?

If so, what period do you propose?

or (*b*) until the death of the last survivor of the group concerned?

or (*c*) until the expiration of a period of a specified number of years as from the date of death of the last survivor?

If so, what period do you propose?

VIII. — ASSIGNMENT OF RIGHTS

19. Do you consider that the acquisition from a performer of the right to record all his future performances in consideration of a lump sum payment should be prohibited?

20. Do you consider that the regulations concerning the assignment of rights should provide for a system whereby the performer would be given an interest in the commercial success of his performance

(*a*) by laying down the principle of a periodical revision of contracts?

or (*b*) by laying down the principle of the payment to the performer of a percentage on the sale resulting from the commercial handling of his performance?

If you consider that neither of these two proposed solutions is acceptable, what other system do you propose?

IX. — ARBITRATION IN CASE OF DISPUTES

21. Do you consider that the international regulations should lay down the principle that any disputes which may arise with regard to performers' rights should be settled by arbitration, it being understood that the arbitration procedure would be laid down by national collective agreements, Acts or regulations?

X. — EXCEPTIONS TO THE APPLICATION OF PERFORMERS' RIGHTS

22. Do you consider that the international regulations should stipulate that exceptions may be provided to the application of the right of authorisation and the pecuniary rights of performers in the case of auditions of public interest ?

23. Do you consider that in order to define these exceptional cases it would be desirable

(*a*) to indicate in the international regulations what is meant by the term " auditions of public interest " ?

If so, what types of performances would you propose to include under this heading?

or (*b*) to leave it to the competent national authorities to define the types of performances to be included under the heading " auditions of public interest " ?

APPENDICES

APPENDIX I

ADVISORY COMMITTEE ON PROFESSIONAL WORKERS (I.L.O.)

Resolutions on Performers' Rights

SECOND SESSION (December 1929)

The Committee, having taken note of the report prepared by the International Labour Office on the rights of performers in connection with broadcasting, and having noted the demands put forward by performers on the subject of these rights, and considering that the problems thus raised can be solved only on an international basis, with due respect for the rights already accorded to authors and composers, and that they call for the drafting of a new code of rights,

Requests the Governing Body to instruct the International Labour Office to carry out a thorough investigation, with the collaboration of the International Committee on Intellectual Co-operation of the League of Nations and the International Institute for the Unification of Private Law, and such other bodies as it finds necessary.

The results of this enquiry will be submitted in a report to the Governing Body, after being first discussed by the Advisory Committee at its next session, when the Committee will draft a final text, after hearing expert opinion, if the officers of the Committee consider it desirable.

THIRD SESSION (March 1931)

The Committee, recalling the principle that any utilisation of the work of others should involve fair remuneration for the person who is the primary cause of the profit, affirms :

That the new means of expression or of reproduction have developed important industries and resulted for theatrical workers in the risk of lessened employment ;

That the Committee had, in 1929, drawn up a resolution, which was approved by the Governing Body, requesting an investigation of this situation ;

That the International Labour Office, in its report to the present sitting, had suggested certain definite questions regarding the principle of an international regulation ;

That, while recognising that broadcasting necessarily interests the public at large, it appears only just to admit, in favour of performers, certain rights to appropriate remuneration ;

That it also appears just that legal protection be granted them for the purpose of avoiding or making good any prejudice to their reputation caused by defective or abusive reproduction ;

And is of opinion that the settlement of these rights necessitates consultation and possibly the drawing up of precise proposals towards

which end work ought to be continued on the basis of the report of the International Labour Office by a joint sub-committee of restricted membership of which the Committee requests the appointment.

This sub-committee may be authorised to proceed to such consultations as may be found desirable.

FOURTH SESSION (November 1933)

The Committee on Professional Workers, having examined the reports of the Office and of its special sub-committee on the question of the rights of performers in connection with broadcasting and other systems of reproducing sounds and images,

And having heard the views of the members of this sub-committee,

Is of the opinion that the question provides a suitable subject for one or more international draft Conventions.

The Committee therefore requests the Governing Body to instruct the Office to complete its documentation and to continue its study and work, and expresses the desire that the question be inscribed on the agenda of one of the coming International Labour Conferences.

APPENDIX II

CONFERENCE FOR THE REVISION OF THE BERNE CONVENTION

(ROME, 1928)

Summary of Proposals and Discussion[1]

FIRST PROPOSAL

Article 11 A (new)

1. . . . . .

2. Performers who execute literary or artistic works shall be exclusively entitled to authorise the diffusion of their performances by one of the means specified in the preceding paragraph (telegraph or telephone with or without wire or any other process analogous thereto and used to transmit sounds or images).

Discussion

At first the proposal on the agenda was supported by the *Austrian* delegation only. This delegation, however, expressed the view that performers' rights should be protected on the same basis as had been adopted in the case of derivative works (translations, adaptations, etc.). It also suggested the addition of the following words at the end of the proposed paragraph 2 : " If several persons take part in a performance, this right shall belong to the person who directs such performance (the producer) ".

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[1] Extracts from INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS : Documents of the Rome Conference, 7 May-2 June 1928 (in French only). Berne, Office of the Union, 1929.

The *Danish* and *Norwegian* delegations recognised the need for protecting performers against the clandestine recording of their interpretations by means of a broadcast; but they were not certain whether this matter should be dealt with in the Berne Convention or in a special instrument. The *Czechoslovak* delegation considered that the question was not yet ripe, and desired to leave its regulation to national authorities.

The *French* delegation considered that the protection of performers lay outside the scope of the Convention, and the *German* Government was also of opinion that such protection exceeded the limits laid down in Article 2. The *Hungarian* and *Rumanian* delegations also opposed the protection of performers.

On the other hand, the *Wireless Sub-Committee*, recognising that this proposal (made by the Italian Government and the Berne Office) could not be passed over in complete silence, voted by acclamation a motion inviting the Governments represented at the Conference to take steps which would effectively safeguard the rights of artistes. This motion was adopted by the Conference after slight amendment.

Second Proposal

Article 13 : Add a new paragraph 1 A, as follows :

" When a musical work is adapted to mechanical instruments with the aid of performers, the latter shall benefit from the protection granted to the adaptation."

Discussion

This was proposed by the organisers of the Conference (the Italian Government and the Berne Office), as a parallel clause to the agenda proposal for a new Article 11 A, 2. It was approved by the *German* delegation, which nevertheless criticised the rigidity of the wording in that it appeared to deprive performers of a right of their own and merely to give them a sort of usufruct of author's rights; attention would, however, have to be given to the protection of recorded performances of works the copyright of which had expired.

In the discussion, the *Swiss* delegation supported the view of the German Government. The *Swedish* delegation followed suit, and proposed the following text :

" When such an adaptation is prepared with the aid of performers, the right to reproduce or publicly to execute this adaptation shall depend on their authorisation also."

The *Irish* delegation suggested a settlement of the question in Article 2 by means of a draft which appeared to be in harmony with the view of the German Government. Lastly, the *Norwegian* delegation was of the opinion that a new paragraph 1 B should be inserted in Article 13; this would give performers the right to consider as counterfeits and prosecute as such any instruments, the preparation of which they had not authorised, for the mechanical reproduction of their performances or interpretations.

The *French* delegation declared itself resolutely opposed to the whole series of proposals for the general reason already mentioned with regard to Article 11 A, namely that the question of protecting performers was outside the scope of the Convention.

The *Hungarian* delegation also urged the rejection of the proposed paragraph 1 A.

The *Italian* Government abandoned the attitude which, together with the International Office, it had at first defended, and agreed that there was too much divergence between the national laws for it to be possible to regulate the protection of performers with regard to mechanical musical instruments, in the text of the Berne Convention.

The *Czecho-Slovak* and *Polish* delegations, while approving the new attitude adopted by the Italian administration, considered that the interpretation of a work of art by a virtuoso was a creation perfectly capable of being protected, equally with an adaptation (instance quoted by the Czecho-Slovak delegation) or a translation (instance quoted by the Polish delegation). This theory was vigorously opposed by the representatives of the French and German authors, who insisted that an interpretation could not be assimilated to a creation, even at second hand.

The *British* delegation was no more favourable to basing the protection of performers on the Convention. It made a proposal for the protection of mechanical instruments, and recognised that the value of records was increased by the contribution of the performer, if he was a famous virtuoso.

The agenda proposal and those to a similar effect were consequently rejected. Nevertheless, the discussion left the general impression that performers required protection of some sort. The motion in their favour, carried by the Wireless Sub-Committee at the suggestion of the Norwegian delegation and taken over by the Italian Government is drafted in sufficiently comprehensive terms to be applicable to the recording and mechanical performance of works of music as well as to broadcasting.

APPENDIX III

INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS

Resolutions concerning Performers' Rights

EIGHTH CONGRESS (Copenhagen, 1933)

Whereas recognition of the claim of performers to an exclusive right over the reproduction of their works would constitute a threat to authors' rights, since in case of such recognition the exclusive right accorded to authors in national laws and international Conventions would be limited by the existence of another exclusive right over the same reproduction or performance of a work already copyright,

Whereas the problem is all the graver because the new methods of transmission and reproduction tend more and more to take the place of older methods for the execution or performance of works of the mind;

And whereas it is nevertheless necessary to take account of this development, since authors and composers should not remain outside the regulation of a question which so closely affects their vital interests :

The Congress of the Confederation

Protests against any provision tending to restrict the exclusive right held by the author over the reproduction or adaptation of a copyright work and over every method of transmission, recording or other utilisation of such reproduction or adaptation (any protection which might be accorded to performers should in no case be of the nature of an exclusive right),

And desires that the officers of the Confederation keep in touch with the International Labour Office, to which the study of the problem of protecting performing artists has been allotted.

Twelfth Congress (Paris, 1937)

The International Confederation of Societies of Authors and Composers, having met in Congress in Paris, and having heard Mr. Piola-Caselli's report, delivered in his speech at the sitting of 16 June 1937,

Desirous of safeguarding the exclusive character of the authors' right over his works, and feeling some concern at the claims brought forward by performing artists and by the gramophone-record, broadcasting and cinema industries,

In the face of these claims, once more most categorically affirms that the exclusive right of ownership, vested in the author and derived from his creation of the work, by its very nature admits of no sharing with the rights of persons contributing to the technical preparation, reproduction and technical transmission of works of the mind,

And instructs the Committee on Legislation to study the problem from the legal point of view.

* * *

The International Confederation of Societies of Authors and Composers, having met in Congress in Paris, expressly requests its affiliated societies to oppose, by every means which their rules permit, the admittance of stage or film producers or of performers to any share in the right of authors over their works, which must remain exclusive.

Thirteenth Congress (Stockholm, 1938)

The International Confederation of Societies of Authors and Composers, having taken note of Mr. Piola-Caselli's report on "Authors' and Related Rights ", confirms the resolutions adopted at the Paris Congress for the complete and undivided protection of the author's exclusive right of ownership ;

And, since the activity of the interpreter or performer cannot be considered as work of creation or elaboration within the meaning of the regulations for the protection of authors' rights,

Expresses the hope

That protection of such activity may not take the form of recognition, for the persons engaging in it, of an exclusive right over the reproduction or transmission of their performances such as might compete with the exclusive right of the author,

And that in the revision of the Berne Convention any amendment tending directly or indirectly to recognise or approve such an exclusive right for performers may be rejected.

APPENDIX IV

SIXTH INTERNATIONAL LEGAL CONGRESS ON WIRELESS TELEGRAPHY AND TELEPHONY

(Brussels 1935)

Draft for an International Convention on Broadcasting

(Extracts)

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Article 9. — The High Contracting Parties recognise the right of interpretative artists and performers to fair compensation for every broadcast of their interpretations of literary or artistic works, made without their consent.

The High Contracting Parties recognise further the right of interpretative artists and performers to object to any broadcast calculated to harm their reputation.

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APPENDIX V

INTERNATIONAL UNION OF ARTISTES

Preliminary Draft for an International Convention for the Protection of Artistes Interpreting and Performing Works of Art and Literature

Article 1

The contracting countries constitute a Union for the protection of the rights of interpretative and performing artistes over their interpretations or performances of works of art or literature, without prejudice to the rights of authors or their assignees over the works themselves.

Article 2

The expression " interpretation or performance of a work of art or literature " comprises all the manifestations of the creative activity and work of artistes, by way of interpretation or performance, whatever their mode or form.

The contracting countries are bound to ensure the protection of interpretations and performances of works of art or literature.

Article 3

The expression " works of art or literature " comprises all literary, scientific and artistic productions as defined and protected by the

Berne Convention of 1886, revised and modified at Berlin in 1908 and at Rome in 1928.

Article 4

Artistes belonging to any one of the countries of the Union shall enjoy, in all other countries of the Union, the advantages which the laws and regulations of each now afford or will in future afford to its nationals, as well as the rights especially afforded by the present Convention.

The enjoyment and exercise of such rights are free of all formality and are independent of the existence of protection in the countries where the original interpretation or performance took place.

Consequently, apart from the stipulations of the present Convention, the extent of protection and the means of redress guaranteed to the artiste to safeguard his rights will be regulated according to the legislation of the country where protection is claimed.

The country of origin of an interpretation or performance is deemed to be that which the artiste is inhabiting at the time of such interpretation or performance.

Artistes belonging to the Union are under no obligation to prove domicile or residence in the country in which protection is claimed.

Article 5

Artistes not belonging to one of the countries of the Union shall enjoy in that country the same rights as national artistes, and, in the other countries of the Union, the rights afforded by the present Convention.

Article 6

The duration of the protection afforded by the present Convention covers the life of the interpretative or performing artiste and 25 years after his death.

Nevertheless, if this duration is not uniformly adopted by all the countries of the Union, it shall be regulated by the laws of the country where protection is claimed and cannot exceed the duration fixed in the country of origin of the interpretation or performance.

The duration of the rights appertaining in common to several artistes who interpret or perform the same work in common is calculated according to the date of decease of the last survivor of these artistes.

Article 7

Interpretative and performing artistes have the exclusive right to carry out or authorise

(1) the reproduction, transmission, adaptation or recording of their interpretations or performances by mechanical, wireless, or other means of reproducing or transmitting sounds or images such as the gramophone, the silent, talking or sound film, wireless broadcasting, wireless or other telegraphy or telephony, and television ;

(2) the public performance or the representation of the said reproduced, transmitted, adapted or recorded interpretations or performances.

In order to enjoy the protection of this Article, artistes are not bound to forbid the reproduction, transmission, adaptation, recording, representation or public execution of their interpretations or performances.

The provision contained in paragraph 1 has no retroactive force and is therefore not applicable to interpretations and performances which may have been lawfully reproduced, adapted or recorded in one of the countries of the Union before this Convention comes into force, or, in the case of a country which may adhere to the Convention in the future, before the date of such adherence.

The rights under consideration in paragraph 2 apply to all recording, reproduction and adaptation made with the aid of artistes still alive at the date on which this Convention comes into force.

Article 8

Interpretative and performing artistes may cede to third parties all or part of the rights mentioned in Article 7, paragraph 1.

Article 9

Apart from the rights of ownership, and even after these have been ceded, the artiste retains the right to claim that an interpretation or performance is his work and to object to any deformation, mutilation or modification whatever thereof which may damage his honour or his reputation.

Article 10

Any utilisation of an interpretation or performance contrary to the provisions of the Convention shall be considered an offence.

The competent authorities of the country of the Union in which the original interpretation or performance is legally protected may proceed by way of prohibition or confiscation, even though the illicit utilisation may proceed from a country where the interpretation or performance is not protected or has ceased to be so.

Such prohibition or confiscation can take place only with the authorisation of the competent judicial authority, according to each country's internal legislation and in conformity with its rules of procedure.

Article 11

The provisions of this Convention shall not prevent appeal to any wider provisions in favour of aliens in general which may be contained in the legislation of any of the countries of the Union.

Article 12

An international office shall be set up entitled *International Bureau of the Union for the Protection of the Rights of Interpretative and Performing Artistes.*